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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-1195

AMERICAN PIPE AND CONSTRUCTION CO., *et al.*,
Petitioners,

vs.

STATE OF UTAH, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

APPENDIX.

In Two Volumes.

Volume I.
(Pages 1 to 312).

APPENDIX.

CHRONOLOGICAL LIST OF IMPORTANT DATES ON WHICH PLEADINGS WERE FILED, HEARINGS HELD AND ORDERS ENTERED.

Date	Event
1954 to a date four years preceding the filing of the Complaint	Complaint Period for Concrete Pipe Alleged in Proposed Amended Complaint of Interveners (A. 503; R. 441)
1958 to a date four years preceding the filing of the Complaint	Complaint Period for Steel Pipe Alleged in Proposed Amended Complaint of Interveners (A. 503; R. 441)
December 31, 1962	End of Period of Alleged Conspiracies (A. 484, n. 2; R. 449, n. 2)
March 10, 1964	Return of Five Indictments Upon Which Utah Complaint is Based (United States District Court, Southern District of California, Central Division) (A. 11-51; R. 8-46)
June 19, 1964	Criminal Cases Terminated With Judgments on Nolo Pleas (United States District Court, Southern District of California, Central Division) (A. 52-71; R. 48-68)

Date	Event
June 23, 1964	Five Civil False Claims Actions Instituted by United States of America (United States District Court, Southern District of California, Central Division) (A. 72-139; R. 70-134)
October 28, 1964	Amended Complaints Filed by United States of America to Prevent and Restrain Violations of Sherman Act (United States District Court, Southern District of California, Central Division) (A. 140-231; R. 136-228)
December 8, 1967	Consent Decrees Filed and Entered in Civil Actions as to All Defendants Except American Pipe and Construction Co. (United States District Court, Central District of California) (A. 232-83; R. 230-84)
May 24, 1968	Final Judgment as to American Filed (United States District Court, Central District of California) (A. 284-312; R. 286-315)
May 27, 1968	Final Judgment as to American Entered (United States District Court, Central District of California) (A. 284-312; R. 286-315)

Date	Event
December 8, 1968	One Year After Consent Decrees Entered in Civil Actions as to All Defendants Except American Pipe and Construction Co.
May 13, 1969	Complaint Filed by State of Utah (United States District Court, District of Utah, Central Division)* (A. 313-40; R. 317-40)
May 24, 1969	One Year After Final Judgment as to American
December 4, 1969	Order Entered by Judge Martin Pence "that the action herein may not be maintained as a class action and, no parties having joined therein the class action * * * in all respects stands terminated as of May 13, 1969." (United States District Court, Central District of California) (A. 344-45; R. 346-47)
December 12, 1969	Motion to Intervene as Plaintiffs by Certain Respondents Filed (United States District Court, Central District of California) (A. 355-59; R. 359-63)

*Transferred to Judge Pence in United States District Court, Central District of California August 20, 1969, by the Judicial Panel on Multidistrict Litigation.

Date	Event
December 29, 1969	Motion to Intervene as Plaintiffs as to Additional Respondents Filed (United States District Court, Central District of California) (A. 386-87; R. 364-66)
March 30, 1970	Decision of Judge Martin Pence Entered Denying Respondents' Motion to Intervene (United States District Court, Central District of California) (A. 482-502; R. 447-65)
June 23, 1970	Findings of Fact and Order Denying Respondents' Motion to Intervene Filed (United States District Court, Central District of California) (A. 505-08; R. 443-45)
December 11, 1972	Opinion by Divided Court (United States Court of Appeals for the Ninth Circuit) Filed Reversing the Order of the Trial Court Denying Intervention (Appendix E, Petition for Writ of Certiorari, 40-48)
January 31, 1973	Amended Opinion by Divided Court (United States Court of Appeals for the Ninth Circuit) Filed Reversing Order of the Trial Court Denying Intervention (Appendix D, Petition for a Writ of Certiorari, 33-39)

PERTINENT TEXT OF STATUTES, FEDERAL RULES AND REGULATIONS INVOLVED.

1. United States Code, Title 15, Section 15 (Clayton Act of October 15, 1914, c. 323, § 4, 38 Stat. 731):

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

2. United States Code, Title 15, Section 15a (Clayton Act of October 15, 1914, c. 323, § 4A, as added July 7, 1955, c. 283, § 1, 69 Stat. 282):

> "Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefore in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained and the cost of suit."

3. United States Code, Title 15, Section 15b (Clayton Act of October 15, 1914, c. 323, § 4B, as added July 7, 1955, c. 283, § 1, 69 Stat. 283):

> "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years

after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."

4. United States Code, Title 15, Section 16(b) (Clayton Act of October 15, 1914, c. 323, § 5(b), 38 Stat. 731, as amended July 7, 1955, c. 283, § 2(b), 69 Stat. 283):

"Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

5. Rule 3, Federal Rules of Civil Procedure:

"COMMENCEMENT OF ACTION

A civil action is commenced by filing a complaint with the court."

6. Rule 23 (a), (b), and (c), Federal Rules of Civil Procedure:

"CLASS ACTIONS

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final in-

junctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) **Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each

member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

7. Rule 24(b), Federal Rules of Civil Procedure:

"(b) **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for

ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Indictment.

United States District Court, Southern District of California, Central Division.

United States of America vs. American Pipe and Construction Co.; United Concrete Pipe Corp.; Lloyd R. Earl; Robert V. Edwards; and Richard I. Young. Criminal No. 33338.

The Grand Jury charges:

I

DEFINITIONS

1. As used herein, the term:

a. "Concrete pipe" means pipe constructed of concrete either with or without metal components as herein defined, to convey water or sewage, and includes both pressure and nonpressure pipe;

b. "Metal components" refers to steel sheets, skelp, rods, wire and mesh used in the manufacture of concrete pipe;

c. "Western Area" refers to California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii; and

d. "End users" means customers who purchase and install or have installed concrete pipe to transport drinking water and for sanitation, drainage, irrigation, flood control and similar purposes.

II

THE DEFENDANTS

2. American Pipe and Construction Co. (referred to herein as American) is hereby indicted and made

a defendant herein. Said defendant is a corporation existing under the laws of the State of California with its principal place of business in Monterey Park, California. During the period of time covered by this indictment, said defendant owned a substantial majority of the shares of American Concrete Pipe Co., an Arizona corporation, and controlled said corporation, hereinafter named a co-conspirator. Said defendant and said co-conspirator engaged, among other things, in the business of manufacturing and of selling concrete pipe.

3. United Concrete Pipe Corp. (referred to hereinafter as United) is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of California with its principal place of business in Baldwin Park, California. During the period of time covered by this indictment, said defendant engaged in the business of manufacturing and selling concrete pipe to customers, including customers within the Western Area.

4. Each of the individuals listed below is hereby indicted and made a defendant herein. During the period of time covered by this indictment, each said individual defendant occupied the position with the defendant corporation indicated below:

Name	Position	Defendant Company
Lloyd R. Earl	President	United
Robert V. Edwards	President	American
Richard I. Young	Vice President	United

III
CO-CONSPIRATORS

5. American Concrete Pipe Co., and various other companies and individuals not made defendants in this indictment, participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof.

IV
NATURE OF TRADE AND COMMERCE

6. Concrete pipe is used in the construction of systems to convey water and sewage and is used primarily for the conveyance of drinking water and for sanitation, irrigation, drainage, flood control and similar purposes.

7. The construction of systems utilizing concrete pipe is customarily contracted for by the end user with general contractors on the basis of competitive bids. Prior to submitting such bids, the general contractors usually solicit quotations from pipe manufacturers for the purchase price of the pipe delivered to the site where the pipe is to be installed. The award winning contractor usually contracts for the purchase of the pipe from the low quoting pipe manufacturer at the price quoted by the latter. Occasionally the end user contracts directly with a pipe manufacturer for the purchase of concrete pipe and usually on the basis of competitive bidding.

8. The corporate defendants are the principal manufacturers of concrete pipe in the Western Area and

during the period 1958 through 1961 their average annual sales of concrete pipe in the Western Area were at least $41,500,000. Because of the relatively limited number of manufacturers of concrete pipe, general contractors and end users frequently solicit bids for said pipe from manufacturers outside the State where said pipe is to be installed. Manufacturers of said pipe usually manufacture the pipe for a particular job only after receiving an order for it. Said manufacturers customarily identify each section of pipe so as to designate its position in the pipe line and deliver or have delivered said pipe direct to the trench side or as near as possible to the place where it will be installed. During the period of time covered by this indictment, the defendants herein have manufactured substantial quantities of concrete pipe at their plants within the Western Area, and have sold, shipped, and delivered said pipe to job sites outside the State where it was manufactured. Thus said concrete pipe moves in a continuous and uninterrupted flow from the place of manufacture, including the plants of defendants herein, to points of installation outside the State where said pipe was manufactured.

9. Most concrete pipe is reinforced with metal components as it is manufactured both to strengthen the pipe and particularly with respect to concrete pressure pipe, to make it watertight. The defendant manufacturers purchase said metal components in anticipation of orders for concrete pipe or to enable them to fill existing orders for concrete pipe. Substantial quantities

of the metal components which the defendants use in manufacturing concrete pipe within the Western Area are produced outside the State where said pipe is manufactured. The movement in interstate commerce of the metal components is necessary to the manufacture and sale of concrete pipe by the defendants in the Western Area and the defendants and co-conspirators are conduits through which said metal components flow in a continuous uninterrupted stream in interstate commerce from the place where said components are produced to the place within the Western Area where the components are incorporated into concrete pipe and on to the final site where said pipe is installed.

10. Any restraint upon free competition in the production or sale of concrete pipe in the Western Area necessarily and directly restrains and affects the interstate flow of concrete pipe and the interstate flow of the metal components used in the construction of said pipe.

V

OFFENSE CHARGED

11. Beginning in or prior to the year 1954, and continuing thereafter until at least August 1962, the exact dates being to the grand jurors unknown, the defendants and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. Section 1, commonly known as the Sherman Act.

12. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were:

a. To submit collusive and rigged bids for the sale of concrete pipe;

b. To allocate and divide orders for the purchase of concrete pipe among themselves.

13. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which, as hereinbefore alleged, they combined and conspired to do, including, among others, the following things:

a. Defendants and co-conspirators held periodic meetings to tally past orders and to discuss prospective orders for the purpose of allocating prospective orders among said defendants and co-conspirators according to pre-agreed percentages; and

b. At such meetings and in subsequent telephone conversations defendants and co-conspirators agreed between and among themselves as to which manufacturer would make the low bid and which manufacturers would submit higher complementary bids not intended to win awards on such jobs. Jobs for the following end users, among others, were thus allocated among the corporate defendants:

Metropolitan Water District of Southern California; East Bay Municipal Utility District, Oakland, California; San Diego County Water Authority; Los Angeles County Flood Control District; Calleguas Municipal Water District; City of San

Diego; Orange County Sanitation District; California Division of Highways; Los Angeles Department of Water and Power; City of Phoenix, Arizona; City of Everett, Washington; California Department of Water Resources; Contra Costa Sanitary District, California; United States Bureau of Reclamation, Placerville and San Joaquin, California; United States Corps of Engineers, Walla Walla, Washington; Sonoma County Flood Control and Water Conservation District; El Toro Water District and The Los Alisos Water District, Orange County, California; Humboldt Bay Municipal Water District, California; City of Aberdeen, Washington; Santiago Aqueduct Commission, Santa Ana, California.

VI

EFFECTS OF THE CONSPIRACY

14. The aforesaid combination and conspiracy had, among others, the following effects:

a. Competition between and among the defendants and co-conspirators was restricted and suppressed;

b. General contractors and other awarding authorities were deprived of the right to receive competitive bids and quotations for concrete pipe and were deceived into believing collusive and non-competitive bids and quotations were competitive; and

c. The cost of concrete pipe in the Western Area was arbitrarily increased.

VII

JURISDICTION AND VENUE

15. The aforesaid combination and conspiracy was formed and carried out, in part, within the Southern District of California, Central Division, and within the jurisdiction of this Court, within five years preceding the return of this indictment.

Dated:

A TRUE BILL

Foreman

BARBARA J. SVEDBERG
Attorney, Department of Justice

DONALD J. FALLON
Attorney, Department of Justice

/s/ William H. Orrick, Jr.
WILLIAM H. ORRICK, JR.
Assistant Attorney General

/s/ Harry G. Sklarsky
HARRY G. SKLARSKY
Attorney, Department of Justice

STANLEY E. DISNEY
Attorney, Department of Justice

FRANCIS C. WHELAN
United States Attorney

Filed March 10, 1964.

[Endorsement omitted in printing]

Indictment.

United States District Court, Southern District of California, Central Division.

United States of America, vs. Kaiser Steel Corporation; United States Steel Corporation; P. M. Cobb; and Ernest L. Ilsley. Criminal No. 33339.

The Grand Jury charges:

I

DEFINITIONS

1. As used herein, the term:

(a) "Steel large diameter pressure pipe," referred to herein as steel LDP pipe, means heavy walled welded steel pipe which is manufactured in diameters of over 24 inches and sold for the conveyance of water or sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch;

(b) "Western Area" refers to California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho, and Hawaii;

(c) "End users" means customers who purchase and install or have installed steel LDP pipe in systems primarily for the conveyance of water or sewage under pressure.

II

THE DEFENDANTS

2. Kaiser Steel Corporation (referred to herein as Kaiser) is hereby indicted and made a defendant herein. Said defendant is a Nevada corporation with its principal offices in Oakland, California. During the period of time covered by this indictment, said defendant engaged, among other things, in the production

and sale of steel LDP pipe to customers within the Western area.

3. United States Steel Corporation (referred to herein as U.S. Steel) is hereby indicted and made a defendant herein. Said defendant is a New Jersey corporation which in 1948 acquired the Consolidated Western Steel Corporaton, and which, during the period of the conspiracy, it operated as a division of U.S. Steel, with its principal offices in Commerce, California. During the period of time covered by this indictment, said defendant manufactured and sold steel LDP pipe at plants within the Western area a substantial majority of which it sold to customers within said area.

4. Each of the individuals listed below is hereby indicted and made a defendant herein. During the period of time covered by this indictment each said defendant occupied the position with the defendant corporation indicated below:

Name	Position	Defendant Company
P. M. Cobb	Vice President, Sales, Consolidated Western Division	U.S. Steel
Ernest L. Ilsley	Vice President and General Manager, Napa-Fontana Fabricating Division	Kaiser

III

CO-CONSPIRATORS

5. Southwest Welding and Manufacturing Company and certain officers and employees of Southwest and of the corporate defendants participated as co-conspirators with the defendants in the offense alleged herein and performed acts and made statements in furtherance thereof.

IV

NATURE OF TRADE AND COMMERCE

6. Steel LDP pipe is used for the conveyance of drinking water under pressure and for irrigation and sanitation systems. The construction of systems utilizing steel LDP pipe is customarily contracted for by the end user with general contractors on the basis of competitive bids. Prior to submitting such bids, the general contractors usually solicit quotations from pipe manufacturers or other suppliers for the purchase price of the pipe delivered to the site where the pipe is to be installed. The award winning contractor usually contracts for the purchase of the pipe from the low quoting pipe manufacturer or supplier at the price quoted. Occasionally the end user contracts directly with a pipe manufacturer or other supplier for the purchase of steel LDP pipe and usually on the basis of competitive bidding.

7. The corporate defendants are the principal manufacturers of steel LDP pipe in the Western area. Total sales of steel LDP pipe in the Western area during the period 1958 through 1961 by the corporate defendants averaged at least $7,000,000 annually. Because of the relatively limited number of manufacturers of steel LDP pipe, general contractors and end users frequently solicit bids for said pipe from manufacturers outside the State where said pipe is to be installed. Manufacturers of said pipe usually manufacture the pipe for a particular job only after receiving an order for it. Said manufacturers customarily identify each section of pipe so as to designate its position in the pipe line and deliver or have delivered said pipe direct to the trench site or as near as possible to the place

where it will be installed. During the period of time covered by this indictment, the defendants herein have manufactured substantial quantities of steel LDP pipe at their plants within the Western area, and have sold, shipped, and delivered said pipe to job sites outside the State where it was manufactured. Thus said steel LDP pipe moves in a continuous and uninterrupted flow from the place of manufacture, including the plants of defendants herein, to points of installation outside the State where said pipe was manufactured.

8. Steel LDP pipe is fabricated largely from steel plate. The defendant manufacturers purchase or produce said steel plate in anticipation of orders for steel LDP pipe or to enable them to fill existing orders for steel LDP pipe. Substantial quantities of the steel plate which the defendants use in manufacturing steel LDP pipe within the Western area are produced outside the State where said pipe is manufactured. The movement in interstate commerce of the steel plate is necessary to the manufacture and sale of steel LDP pipe by the defendants in the Western area and the defendants and co-conspirators are conduits through which said steel plate flows in a continuous uninterrupted stream in interstate commerce from the place where said plate is produced to the place within the Western area where the plate is fabricated into steel LDP pipe and on to the final site where said pipe is installed.

9. Any restraint upon free competition in the production or sale of steel LDP pipe in the Western area necessarily and directly restrains and affects the inter-

state flow of steel LDP pipe and the interstate flow of the steel plate used in the fabrication of said pipe.

V

OFFENSE CHARGED

10. Beginning sometime prior to 1955, and continuing thereafter until at least August 1962, the exact dates being to the grand jurors unknown, the defendants and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. Section 1, commonly known as the Sherman Act.

11. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were:

(a) To submit collusive and rigged bids for the sale of steel LDP pipe;

(b) To allocate and divide orders for the purchase of steel LDP pipe among themselves.

12. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which, as hereinbefore alleged, they combined and conspired to do, including, among others, the following things:

(a) Defendants and co-conspirators held periodic meetings to tally past orders and to discuss prospective orders for the purpose of allocating prospective orders among said defendants and co-

conspirators according to pre-agreed percentages; and

(b) At such meetings and in subsequent telephone conversations defendants and co-conspirators agreed between and among themselves as to which manufacturer would make the low bid and which manufacturers would submit higher complementary bids not intended to win awards on such jobs. Jobs for the following end users, among others, were thus allocated among the defendants: Metropolitan Water District of Southern California; East Bay Municipal Utility District, Oakland, California; San Diego County Water Authority, California; Calleguas Municipal Water District, California; City of San Diego, California; Los Angeles Department of Water and Power, California; El Toro Water and The Los Alisos Water District, Orange County, California; Santiago Aqueduct Commission, Santa Ana, California.

VI

EFFECTS OF THE CONSPIRACY

13. The aforesaid combination and conspiracy had, among others, the following effects:

(a) Competition between and among the defendants and co-conspirators was restricted and suppressed;

(b) General contractors and end users were deprived of the right to receive competitive bids and quotations for steel LDP pipe and were deceived into believing collusive and noncompetitive bids and quotations were competitive; and

(c) The cost of steel LDP pipe in the Western area was arbitrarily increased.

VII

JURISDICTION AND VENUE

14. The aforesaid combination and conspiracy was formed and carried out, in part, within the Southern District of California, Central Division, and within the jursdiction of this Court, within five years preceding the return of this indictment.

Dated:

A TRUE BILL

Foreman

BARBARA J. SVEDBERG
Attorney, Department of Justice

DONALD J. FALLON
Attorney, Department of Justice

/s/ WILLIAM H. ORRICK, JR.
William H. Orrick, Jr.
Assistant Attorney General

/s/ HARRY G. SKLARSKY
Harry G. Sklarsky
Attorney, Department of Justice

STANLEY E. DISNEY
Attorney, Department of Justice

FRANCIS C. WHELAN
United States Attorney

Filed March 10, 1964.

[Endorsement omitted in printing]

Indictment.

United States District Court, Southern District of California, Central Division.

United States of America, vs. United Concrete Pipe Corp.; American Pipe and Construction Co.; Kaiser Steel Corporation; United States Steel Corporation; P. M. Cobb; Lloyd R. Earl; Robert V. Edwards; Ernest L. Ilsley; and Richard I. Young. Criminal No. 33340.

The Grand Jury charges:

I

DEFINITIONS

1. As used herein, the term:

(a) 'Steel large diameter pressure pipe", (referred to herein as steel LDP pipe), means heavy-walled welded steel pipe, manufactured from steel plate, in diameters over 24 inches and sold for the conveyance of water and sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch;

(b) "Concrete large diameter pressure pipe", (referred to herein as concrete LDP pipe) means concrete pressure pipe, which ordinarily utilizes steel sheets or skelp in its manufacture, in diameters over 24 inches, sold for the conveyance of water and sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch;

(c) "Alternate LDP pipe" refers to LDP pipe which is manufactured and sold, or offered for sale in jobs where the specifications permit the use of either concrete LDP pipe or steel LDP pipe;

(d) "Metal Components" refers to steel plate, sheets, skelp, rods, wires and mesh used in the production of alternate LDP pipe;

(e) "Western area" refers to California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii;

(f) "End users" means customers who purchase and install or have installed alternate LDP pipe in systems primarily for the conveyance of water or sewage under pressure.

II
DEFENDANTS

2. American Pipe and Construction Co. (referred to herein as American) is hereby indicted and made a defendant herein. Said defendant is a corporation existing under the laws of the State of California with its principal place of business in Monterey Park, California. During the period of time covered by this indictment said defendant owned a substantial majority of the shares of American Concrete Pipe Co., an Arizona corporation, and controlled said corporation, hereinafter named a co-conspirator. Said defendant and said co-conspirator engaged, among other things, in the business of manufacturing and of selling concrete LDP pipe including alternate LDP pipe to customers located in the Western area.

3. Kaiser Steel Corporation (referred to herein as Kaiser) is hereby indicted and made a defendant herein. Said defendant is a Nevada corporation with its principal offices in Oakland, California. During the pe-

riod of time covered by this indictment, said defendant engaged, among other things, in the production and sale of steel LDP pipe including alternate LDP pipe to customers within the Western area.

4. United Concrete Pipe Corp. (referred to herein as United) is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of California with its principal place of business in Baldwin Park, California. During the period of time covered by this indictment, said defendant engaged in the business of manufacturing and selling concrete LDP pipe including alternate LDP pipe to customers within the Western

herein as U.S.
defendant herein. Said defendant is a
poration which in 1948 acquired the Consolidated Western Steel Corporation, which, during the period of the conspiracy, it operated as a division of U.S. Steel with its principal offices in Commerce, California. During the period of time covered by this indictment, said defendant manufactured and sold steel LDP pipe, including alternate LDP pipe, at plants within the Western area, a substantial majority of which it sold to customers within said area.

6. Each of the individuals listed below is hereby indicted and made a defendant herein. During the period of time covered by this indictment each said defend-

ant occupied the position with the defendant corporation indicated below:

Name	Position	Defendant Company
P. M. Cobb	Vice President, Sales, Consolidated Western Division	U.S. Steel
Lloyd R. Earl	President	United
Robert V. Edwards	President	American
Ernest L. Ilsley	Vice President and General Manager Napa-Fontana Fabricating Division	Kaiser
Richard I. Young	Vice President, Sales	United

III

CO-CONSPIRATORS

7. Southwest Welding and Manufacturing Company, American Concrete Pipe Co., of Phoenix, Ari- [redacted] companies herein and performed [redacted] furtherance thereof.

IV

NATURE OF TRADE AND COMMERCE

8. The corporate defendants are the principal manufacturers of alternate LDP pipe in the Western area. Total sales of alternate LDP pipe in the Western area by the corporate defendants during the period 1958 through 1961 averaged at least $15,000,000 annually. Said pipe is used primarily for the conveyance of drinking water, but is also utilized in systems for the transportation of sewage and of irrigation water.

9. The construction of systems utilizing alternate LDP pipe is customarily contracted for by the end user with general contractors on the basis of competitive bids. Customarily the end users draft or have drafted the specifications where this is appropriate, so that either concrete LDP pipe or steel LDP pipe can be used in the system. Prior to submitting bids to the end user, the general contractor usually solicits quotations from pipe manufacturers for the purchase price of the pipe delivered to the site where it is to be installed. The award winning contractor usually contracts for the purchase of the pipe from the low quoting pipe manufacturer at the price quoted by the latter. Occasionally the end user contracts directly with the pipe manufacturer for the purchase of said pipe and usually on the basis of competitive bidding.

10. The specifications for alternate LDP pipe require that the pipe be lined and/or coated with concrete. When the steel LDP pipe manufacturers plan to submit bids or quotations on an alternate LDP pipe job, they, in turn, solicit quotations or bids from the concrete LDP pipe manufacturers for the performance of this service. The cost of this service is then incorporated in the quotation or bid submitted to the general contractors or end users by the steel LDP pipe manufacturer.

11. Because of the relatively limited number of manufacturers of alternate LDP pipe, general contractors and end users, where the specifications permit the use of alternate LDP pipe, customarily solicit bids and

quotations both from manufacturers of concrete LDP pipe and from manufacturers of steel LDP pipe, and frequently they solicit bids from said manufacturers outside the State where said pipe is to be installed. Manufacturers of alternate LDP pipe usually manufacture the pipe for a particular job only after receiving an order for it. Said manufacturers customarily identify each section of pipe so as to designate its position in the pipe line and deliver, or have delivered, said pipe direct to the trench side or as near as possible to the place where it is to be installed. During the period of time covered by this indictment, the defendants herein have manufactured substantial quantities of alternate LDP pipe at their plants within the Western area, and in response to solicitations calling for bids on alternate LDP pipe, have shipped and delivered said pipe to job sites outside the State where it was manufactured. Thus said alternate LDP pipe moves in a continuous and uninterrupted flow from the place of manufacture, including the plants of the defendants herein, to points of installation outside the State where said pipe was manufactured.

12. Substantial amounts of metal components are used in the manufacture of alternate LDP pipe. The defendant manufacturers of alternate LDP pipe often obtain said metal components in anticipation of orders for said pipe or to enable them to fill existing orders for said pipe. Substantial quantities of said metal components, used in the manufacture of alternate LDP pipe within the Western area, are produced outside the State where said pipe is manufactured.

13. The movement in interstate commerce of metal components used in alternate LDP pipe is necessary to the manufacture and sale of alternate LDP pipe by the defendants in the Western area and the defendants and co-conspirators are conduits through which said metal components flow in a continuous, uninterrupted stream in interstate commerce from the place where produced to the place within the Western area where said metal components are incorporated into alternate LDP pipe and on to the final site where said pipe is installed. Any restraint upon free competition in the production or sale of alternate LDP pipe in the Western area necessarily and directly restrains and affects the interstate flow of alternate LDP pipe and the interstate flow of said metal components used in the manufacture of alternate LDP pipe.

V

OFFENSE CHARGED

14. Beginning sometime prior to 1955, and continuing thereafter until at least August 1962, the exact dates being to the grand jurors unknown, the defendants and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. Section 1, commonly known as the Sherman Act.

15. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and

concert of action among the defendants and co-conspirators to allocate and divide solicitations for alternate LDP pipe so that the manufacturers of steel LDP pipe would obtain approximately fifty per cent of the orders resulting from said solicitations, and the manufacturers of concrete LDP pipe would obtain approximately fifty per cent of the orders resulting from said solicitations, the amount of business involved in the lining and coating of the steel LDP pipe by the concrete LDP pipe manufacturers being included in the share to be obtained by the concrete LDP pipe manufacturers.

16. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which, as hereinbefore alleged, they combined and conspired to do, including among others, the following things:

(a) Tallies were maintained by representatives of each corporate defendant for the purpose of keeping a record of whether a steel LDP pipe manufacturer or a concrete LDP pipe manufacturer obtained each job. Information needed for such tallies was often obtained at meetings or by telephone conversations between the defendants or co-conspirators.

(b) Jobs for the following end users, among others, were allocated to the steel LDP pipe group or the concrete LDP pipe group of manufacturers at meetings or by telephone conversations between the defendants and co-conspirators: Metropolitan

Water District of Southern California; East Bay Municipal Utility District, Oakland, California; San Diego County Water Authority; Calleguas Municipal Water District; City of San Diego; Los Angeles Department of Water and Power; City of Phoenix, Arizona; El Toro Water District and The Los Alisos Water District, Orange County, California; Humboldt Bay Municipal Water District, California; Santiago Aqueduct Commission, Santa Ana, California.

VI

EFFECTS OF THE CONSPIRACY

17. The aforesaid combination and conspiracy had, among others, the following effects:

(a) Competition between and among the defendants and co-conspirators was restricted and suppressed;

(b) General contractors and other awarding authorities were deprived of the right to receive competitive bids and quotations for alternate LDP pipe and were deceived into believing collusive and noncompetitive bids and quotations were competitive; and

(c) The cost of alternate LDP pipe in the Western area was arbitrarily increased.

VII

JURISDICTION AND VENUE

18. The aforesaid combination and conspiracy was formed and carried out, in part, within the Southern District of California, Central Division, and within the

jurisdiction of this Court, within five years preceding the return of this indictment.

Dated:

A TRUE BILL

Foreman

BARBARA J. SVEDBERG
Attorney, Department of Justice

DONALD J. FALLON
Attorney, Department of Justice

/s/ William H. Orrick, Jr.
WILLIAM H. ORRICK, JR.
Assistant Attorney General

/s/ Harry G. Sklarsky
HARRY G. SKLARSKY
Attorney, Department of Justice

STANLEY E. DISNEY
Attorney, Department of Justice

FRANCIS C. WHELAN
United States Attorney

Filed March 10, 1964.

[Endorsement omitted in printing]

Indictment.

United States District Court, Southern District of California, Central Division.

United States of America, vs. United States Industries, Inc.; American Pipe and Construction Co.; Smith-Scott, Inc.; United Concrete Pipe Corp.; United States Steel Corporation; D. N. Chamberlain; Robert V. Edwards; D. A. Stromsoe; and Richard I. Young. Criminal No. 33341.

The Grand Jury charges:

I

DEFINITIONS

1. As used herein, the term:

(a) "Steel small diameter pressure pipe", referred to herein as steel SDP pipe, means thin walled welded steel pipe, manufactured from steel plate in diameters of 12 inches to 48 inches and sold for the conveyance of water and sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch;

(b) "Concrete small diameter pressure pipe" referred to herein as concrete SDP pipe, means concrete cylinder pipe, which utilizes steel sheet or skelp in its manufacture, in diameters from 12 inches to 48 inches and sold for the conveyance of water or sewage under internal pressure exceeding 115 feet of head or 50 pounds per square inch.

(c) "Alternate SDP pipe" refers to SDP pipe which is manufactured and sold, or offered for

sale in jobs where the specifications permit the use of either concrete SDP pipe or steel SDP pipe;

(d) "Metal components" refers to steel plate, sheets, skelp, rods, wires and mesh used in the production of alternate SDP pipe;

(e) "Western area" refers to California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii;

(f) "End users" means customers who purchase and install or have installed alternate SDP pipe.

II

DEFENDANTS

2. American Pipe and Construction Co. (referred to herein as American) is hereby indicted and made a defendant herein. Said defendant is a corporation existing under the laws of the State of California with its principal place of business in Monterey Park, California. During the period of time covered by this indictment said defendant owned a substantial majority of the shares of American Concrete Pipe Co., an Arizona corporation, and controlled said corporation, hereinafter named a co-conspirator. Said defendant and said co-conspirator engaged, among other things, in the business of manufacturing and of selling concrete SDP pipe.

3. Smith-Scott, Inc. (referred to herein as Smith-Scott) is hereby indicted and made a defendant herein. Said defendant is a corporation existing under the laws of the State of California with its principal place

of business at 6501 Clay Street, Riverside, California. During the period of time covered by this indictment, said defendant engaged in the business of manufacturing and selling and offering for sale Steel SDP pipe.

4. United Concrete Pipe Corp. (referred to herein as United) is hereby indicted and made a defendant herein. Said defendant is a corporation organized and existing under the laws of the State of California with its principal place of business in Baldwin Park, California. During the period of time covered by this indictment; said defendant engaged in the business of manufacturing and selling concrete SDP pipe to customers within the Western area.

5. United States Industries, Inc. (referred to herein as USI) is hereby indicted and made a defendant herein. Said defendant is a Delaware corporation which in 1955 purchased the assets of Southern Pipe & Casing Company, consisting of, among other things, a plant for manufacturing steel SDP pipe which, during the period covered by this indictment, it operated as the Tubular Products Division of USI with headquarters in Azusa, California. Said defendant, during this period, also operated a plant manufacturing steel SDP pipe in Hawaii.

6. United States Steel Corporation (referred to herein as U.S. Steel) is hereby indicted and made a defendant herein. Said defendant is a New Jersey corporation which in 1948 acquired the Consolidated Western Steel Corporation, which during the period of the conspiracy, it operated as a division of U.S. Steel. Said defendant manufactures steel SDP pipe at a plant in Linden, Utah, which is sold directly or through distributors to customers in the Western area.

7. Each of the individuals listed below is hereby indicted and made a defendant herein. During the period of time covered by this indictment each said defendant occupied the position with the defendant corporation indicated below:

Name	Position	Defendant Company
D. N. Chamberlain	Executive Vice President Tubular Division	USI
Robert V. Edwards	President	American
D. A. Stromsoe	President Tubular Division	USI
Richard I. Young	Vice President Sales	United

III

CO-CONSPIRATORS

8. American Concrete Pipe Co., of Phoenix, Arizona, and various other companies and individuals not made defendants in this indictment, participated as co-conspirators in the offense charged herein and performed acts and made statements in furtherance thereof.

IV

NATURE OF TRADE AND COMMERCE

9. The corporate defendants are the principal manufacturers of alternate SDP pipe in the Western area. During the period 1957 through 1961, their average annual sales of alternate SDP pipe in the Western area were approximately $18,000,000. Said pipe is used for the conveyance of drinking water under pressure and for irrigation and sanitation systems.

10. The construction of systems utilizing alternate SDP pipe is customarily contracted for by the end user with general contractors on the basis of competitive

bids. Customarily the end users draft or have drafted the specifications where this is appropriate, so that either concrete SDP pipe or steel SDP pipe can be used in the system. Prior to submitting bids to the end user, the general contractor usually solicits quotations from pipe manufacturers for the purchase price of the pipe delivered to the site where it is to be installed. The award winning contractor usually contracts for the purchase of the pipe from the low quoting pipe manufacturer at the price quoted by the latter. Occasionally the end user contracts directly with the pipe manufacturers for the purchase of alternate SDP pipe and usually on the basis of competitive bidding.

11. Because of the relatively limited number of manufacturers of alternate SDP pipe, general contractors and end users, where the specifications permit the use of alternate SDP pipe, customarily solicit bids both from manufacturers of concrete SDP pipe and from manufacturers of steel SDP pipe, and frequently they solicit bids from said manufacturers outside the State where said pipe is to be installed. Manufacturers of alternate SDP pipe usually manufacture the pipe for a particular job only after receiving an order for it. Said manufacturers customarily identify each section of pipe so as to designate its position in the pipe line and deliver, or have delivered, said pipe direct to the trench side or as near as possible to the place where it is to be installed. During the period of time covered by this indictment, the defendants herein have manufactured substantial quantities of alternate SDP pipe at their plants within the Western area, and in response to solicitations calling for bids on alternate SDP pipe, have shipped and delivered said pipe to job sites outside the State where it was manufactured. Thus said

alternate SDP pipe moves in a continuous and uninterrupted flow from the place of manufacture, including the plants of the defendants herein, to points of installation outside the State where said pipe was manufactured.

12. Substantial amounts of metal components are used in the manufacture of alternate SDP pipe. The defendant manufacturers of alternate SDP pipe often obtain metal components in anticipation of orders for said pipe or to enable them to fill existing orders. Substantial quantities of metal components used in the manufacture of alternate SDP pipe within the Western area are produced outside the State where said pipe is manufactured.

13. The movement in interstate commerce of metal components used in alternate SDP pipe is necessary to the manufacture and sale of alternate SDP pipe by the defendants in the Western area and the defendants and co-conspirators are conduits through which said metal components flow in a continuous, uninterrupted stream in interstate commerce from the place where produced to the place within the Western area where said metal components are incorporated into alternate SDP pipe and on to the final site where said pipe is installed. Any restraint upon free competition in the production or sale of alternate SDP pipe in the Western area necessarily and directly restrains and affects the interstate flow of alternate SDP pipe and the interstate flow of said metal components used in the manufacture of alternate SDP pipe.

V

OFFENSE CHARGED

14. Beginning sometime prior to 1955, and continuing thereafter until at least January 1962, the exact dates being to the grand jurors unknown, the defendants and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. Section 1, commonly known as the Sherman Act.

15. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among the defendants and co-conspirators to allocate and divide alternate SDP pipe jobs so that the manufacturers of steel SDP pipe considered as a group on the one hand, and the manufacturers of concrete SDP pipe considered together on the other hand, would each obtain an agreed upon per cent of all alternate SDP pipe jobs.

16. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which, as hereinbefore alleged, they combined and conspired to do, including among others, the following things:

(a) Tallies were maintained by representatives of each corporate defendant for the purpose of keeping a record of whether a steel SDP pipe manufacturer or a concrete SDP pipe manufacturer obtained each job. Information needed for such tallies was often obtained at meetings or by telephone conversations between the defendants or co-conspirators.

(b) Jobs for the following end users, among others, were allocated to the steel SDP pipe group or the concrete SDP pipe group of manufacturers at meetings or by telephone conversations between the defendants and co-conspirators: East Bay Municipal Utility District, Oakland, California; City of Phoenix, Arizona; Eastern Municipal Water District, California; United States Corps of Engineers, Walla Walla, Washington; Sonoma County Flood Control and Water Conservation District, Sonoma, California; Solano Irrigation District, California; Las Virgenes Municipal Water District, Calabasas, California; Marin Municipal Water District, California; North Marin County Water District, California; City of Long Beach; Calleguas Metropolitan Water District; City of Fountain Valley, California; Otay Municipal Water District, California; Moulton Niguel Water District, Santa Ana, California; City of Oceanside, California; United States Bureau of Reclamation, California; Goleta County Water District, California.

VI

EFFECTS OF THE CONSPIRACY

17. The aforesaid combination and conspiracy had, among others, the following effects:

(a) Competition between and among the defendants and co-conspirators was restricted and suppressed;

(b) General contractors and other awarding authorities were deprived of the right to receive competitive bids and quotations for alternate SDP pipe and were deceived into believing collusive

and noncompetitive bids and quotations were competitive; and

(c) The cost of alternate SDP pipe in the Western area was arbitrarily increased.

VII

JURISDICTION AND VENUE

18. The aforesaid combination and conspiracy was formed and carried out, in part, within the Southern District of California, Central Division, and within the jurisdiction of this Court, within five years preceding the return of this indictment.

Dated:

A TRUE BILL

Foreman

BARBARA J. SVEDBERG
Attorney, Department of Justice

DONALD J. FALLON
Attorney, Department of Justice

/s/ William H. Orrick, Jr.
WILLIAM H. ORRICK, JR.
Assistant Attorney General

HARRY G. SKLARSKY
Attorney, Department of Justice

STANLEY E. DISNEY
Attorney, Department of Justice

FRANCIS C. WHELAN
United States Attorney

Filed March 10, 1964.

[Endorsement omitted in printing].

Indictment.

United States District Court, Southern District of California, Central Division.

United States of America, vs. United States Steel Corporation; Smith-Scott, Inc.; United States Industries, Inc.; D. N. Chamberlain; P. M. Cobb; and William N. Scott. Criminal No. 33342.

The Grand Jury charges:

I

DEFINITIONS

1. As used herein, the term:

(a) "Steel small diameter pressure pipe," referred to herein as steel SDP pipe, means thin walled welded steel pipe which is manufactured in diameters of 4 inches to 48 inches and sold for the conveyance of water under internal pressures exceeding 115 feet of head or 50 pound per square inch;

(b) "Western Area" refers to California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho, and Hawaii;

(c) "End users" means customers who purchase and install or have installed steel SDP pipe in systems primarily for the conveyance of water or sewage under pressure.

II

THE DEFENDANTS

2. Smith-Scott, Inc. (referred to herein as Smith-Scott) is hereby indicted and made a defendant herein. Said defendant is a corporation existing under the laws of the State of California with its principal place of business at 6501 Clay Street, Riverside, California. During the period of time covered by this indictment,

said defendant engaged, among other things, in the production and sale of steel SDP pipe to customers located in the Western area.

3. United States Industries, Inc. (referred to herein as USI) is hereby indicted and made a defendant herein. Said defendant is a Delaware Corporation which in 1955 purchased the assets of Southern Pipe & Casing Company, consisting of, among other things, a plant for manufacturing steel SDP pipe which, during the period covered by the indictment, it operated as the Tubular Products Division of USI with headquarters at Azusa, California. Said defendant, during this period, also operated a plant for the manufacture of steel pipe in Hawaii.

4. United States Steel Corporation (referred to herein as U.S. Steel) is hereby indicted and made a defendant herein. Said defendant is a New Jersey corporation which in 1948 acquired the Consolidated Western Steel Corporation, which during the period of the conspiracy it operated as a division of U.S. Steel. Said defendant manufactures steel SDP pipe at a plant in Linden, Utah, which is sold directly or through distributors to customers in the Western area.

5. Each of the individuals listed below is hereby indicted and made a defendant herein. During the period of time covered by this indictment each said defendant occupied the position with the defendant corporation indicated below:

Name	Position	Defendant Company
D. N. Chamberlain	Executive Vice President	Tubular Division of USI
P. M. Cobb	Vice President, Sales	Consolidated Western Division of U.S. Steel
William N. Scott	President and Director	Smith-Scott

III
CO-CONSPIRATORS

6. Certain individuals, officers, and employees of said defendants, not named defendants in this indictment, participated as co-conspirators with said defendants in the offense alleged herein and performed acts and made statements in furtherance thereof.

IV
TRADE AND COMMERCE INVOLVED

7. Steel SDP pipe is used for the conveyance of drinking water under pressure and for irrigation and sanitation systems. The construction of systems utilizing steel SDP pipe is customarily contracted for by the end user with general contractors on the basis of competitive bids. Prior to submitting such bids, the general contractors usually solicit quotations from pipe manufacturers for the purchase price of the pipe delivered to the site where the pipe is to be installed. The award winning contractor usually contracts for the purchase of the pipe from the low quoting pipe manufacturer at the price quoted by the latter. Occasionally the end user contracts directly with a pipe manufacturer for the purchase of steel SDP pipe and usually on the basis of competitive bidding.

8. The corporate defendants are the principal manufacturers of steel SDP pipe in the Western area. Total sales of steel SDP pipe in the Western area during the conspiracy herein alleged by the corporate defendants averaged at least $13,500,000 annually. Because of the relatively limited number of manufacturers of steel SDP pipe, general contractors and end users frequently solicit bids and quotations for said pipe from manufacturers outside the State where said pipe

is to be installed. Manufacturers of said pipe usually manufacture the pipe for a particular job only after receiving an order for it. Said manufacturers customarily identify each section of pipe so as to designate its position in the pipe line and deliver or have delivered said pipe direct to the trench site or as near as possible to the place where it will be installed. During the period of time covered by this indictment, the defendants herein have manufactured substantial quantities of steel SDP pipe at their plants within the Western area, and have sold, shipped, and delivered said pipe to job sites outside the State where it was manufactured. Thus said steel SDP pipe moves in a continuous and uninterrupted flow from the place of manufacture, including the plants of defendants herein, to points of installation outside the State where said pipe was manufactured.

9. Steel SDP pipe is fabricated largely from steel plate. The defendant manufacturers purchase or produce said steel plate in anticipation of orders for steel SDP pipe or to enable them to fill existing orders for steel SDP pipe. Substantial quantities of the steel plate which the defendants use in manufacturing steel SDP pipe within the Western area are produced outside the State where said pipe is manufactured. The movement in interstate commerce of the steel plate is necessary to the manufacture and sale of steel SDP pipe by the defendants in the Western area and the defendants and co-conspirators are conduits through which said steel plate flows in a continuous uninterrupted stream in interstate commerce from the place where said plate is produced to the place within the Western area where the plate is fabricated into steel SDP pipe and on to the final site where said pipe is installed.

10. Any restraint upon free competition in the production or sale of steel SDP pipe in the Western area necessarily and directly restrains and affects the interstate flow of steel SDP pipe and the interstate flow of the steel plate used in the fabrication of said pipe.

V

OFFENSE CHARGED

11. Beginning at least as early as May 1958, and continuing thereafter until at least January 1962, the exact dates being to the grand jurors unknown, the defendants and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. § 1, commonly known as the Sherman Act.

12. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators, the substantial terms of which were:

(a) To submit collusive and rigged bids and quotations for the sale of steel SDP pipe;

(b) To allocate and divide orders for the purchase of steel SDP pipe among themselves.

13. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which, as hereinbefore alleged, they combined and conspired to do, including, among others, the following things:

(a) Defendants and co-conspirators held periodic meetings to tally past orders and to discuss prospective orders for the purpose of allocating

prospective orders among defendants and co-conspirators according to pre-agreed percentages; and

(b) At such meetings and in subsequent telephone conversations defendants and co-conspirators agreed between and among themselves as to which manufacturer would make the low bid and which manufacturers would submit higher complementary bids not intended to win awards on such jobs. Jobs for the following end users, among others, were thus allocated among the defendants: East Bay Municipal Utility District; City of Phoenix, Arizona; Eastern Municipal Water District, California; Las Virgenes Municipal Water District, Calabasas, California; Marin Municipal Water District, California; North Marin County Water District, California; Calleguas Metropolitan Water District, California; City of Fountain Valley, California; Otay Municipal Water District, California; United States Bureau of Reclamation, California; Goleta County Water District, California.

VI

EFFECTS OF THE CONSPIRACY

14. The aforesaid combination and conspiracy had, among others, the following effects:

(a) Competition between and among the defendants was restricted and suppressed;

(b) General contractors and end users were deprived of the right to receive competitive bids and quotations for steel SDP pipe and were deceived into believing collusive and noncompetitive bids and quotations were competitive; and

(c) The cost of steel SDP pipe in the Western area was arbitrarily increased.

VII

JURISDICTION AND VENUE

15. The aforesaid combination and conspiracy was formed and carried out, in part, within the Southern District of California, Central Division, and within the jurisdiction of this Court, within five years preceding the return of this indictment.

Dated:

A TRUE BILL

Foreman

BARBARA J. SVEDBERG
Attorney, Department of Justice

DONALD J. FALLON
Attorney, Department of Justice

/s/ William H. Orrick, Jr.
WILLIAM H. ORRICK, JR.
Assistant Attorney General

/s/ Harry G. Sklarsky
HARRY G. SKLARSKY
Attorney, Department of Justice

STANLEY E. DISNEY
Attorney, Department of Justice

FRANCIS C. WHELAN
United States Attorney

Filed March 10, 1964.

[Endorsement omitted in printing].

Judgment.

United States District Court, Southern District of California, Central Division.

United States of America, vs. American Pipe and Construction Co. Criminal No. 33338.

On this 19th day of June, 1964, came the attorney for the Government and the defendant appeared in person and by counsel, Hill, Farrer & Burrill by Frank D. MacDowell and William McD. Miller.

IT IS ADJUDGED that the defendant has been convicted upon his plea of nolo contendere of the offense of engaging in an unlawful combination and conspiracy in restraint of interstate trade and commerce, in violation of Title 15, United States Code, Section 1, as charged in the Indictment and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty [Convicted /s/ B] as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine unto the United States of America in the amount of Five Thousand Dollars ($5,000.00)

IT IS ADJUDGED that the execution of the payment of the fine herein imposed is stayed for ten days.

/s/ Albert Lee Stephens, Jr.
United States District Judge

FILED: June 19, 1964
JOHN A. CHILDRESS, Clerk
by /s/ L. Brosnan,
L. A. Brosnan, Deputy

Note: This Judgment amends the Judgment appearing at page 70, *infra.*

Judgment.

United States District Court, Southern District of California, Central Division.

United States of America, vs. American Pipe and Construction Co. Criminal No. 33340.

On this 19th day of June, 1964, came the attorney for the Government and the defendant appeared in person and by counsel, Hill, Farrer & Burrill by Frank MacDowell and Wm. McD. Miller.

IT IS ADJUDGED that the defendant has been convicted upon his plea of nolo contendere of the offense of engaging in an unlawful combination and conspiracy in restraint of interstate trade and commerce, in violation of Title 15, United States Code, Section 1, as charged in the Indictment and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty [Convicted /s/ B] as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine unto the United States of America in the amount of Five Thousand Dollars ($5,000.00).

IT IS ADJUDGED that the execution of the payment of the fine herein imposed is stayed for ten days.

/s/ Albert Lee Stephens, Jr.
United States District Judge

FILED: June 19, 1964
JOHN A. CHILDRESS, Clerk
by /s/ L. Brosnan
L. A. Brosnan, Deputy

Judgment.

United States District Court, Southern District of California, Central Division.

United States of America, vs. American Pipe and Construction Co. Criminal No. 33341.

On this 19th day of June, 1964, came the attorney for the Government and the defendant appeared in person and by counsel, Hill, Farrer & Burrill by Frank MacDowell and Wm. McD. Miller.

IT IS ADJUDGED that the defendant has been convicted upon his plea of nolo contendere of the offense of engaging in an unlawful combination and conspiracy in restraint of interstate trade and commerce, in violation of Title 15, United States Code, Section 1, as charged in the Indictment and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty [Convicted /s/ B] as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine unto the United States of America in the amount of Seven Thousand Dollars ($7,000.00).

IT IS ADJUDGED that the execution of the payment of the fine herein imposed is stayed for ten days.

/s/ Albert Lee Stephens, Jr.
United States District Judge

FILED: June 19, 1964
JOHN A. CHILDRESS, Clerk
by /s/ L. Brosnan
L. A. Brosnan, Deputy

Note: This Judgment amends the Judgment appearing at page 69, *infra*.

Judgment.

United States District Court, Southern District of California, Central Division.

United States of America, vs. United Concrete Pipe Corp. Criminal No. 33338.

On this 19th day of June, 1964, came the attorney for the Government and the defendant appeared in person and by counsel, Gibson, Dunn & Crutcher by John J. Hanson.

IT IS ADJUDGED that the defendant has been convicted upon his plea of nolo contendere of the offense of engaging in an unlawful combination and conspiracy in restraint of interstate trade and commerce, in violation of Title 15, United States Code, Section 1, as charged in the Indictment and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty [Convicted /s/ B] as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine unto the United States of America in the amount of Five Thousand Dollars. ($5,000.00)

IT IS ADJUDGED that the execution of the payment of the fine herein imposed is stayed for ten days.

/s/ Albert Lee Stephens, Jr.
United States District Judge

FILED: June 19, 1964
JOHN A. CHILDRESS, Clerk
by /s/ L. Brosnan
L. A. Brosnan, Deputy

Judgment.

United States District Court, Southern District of California, Central Division.

United States of America, vs. United Concrete Pipe Corp. Criminal No. 33340.

On this 19th day of June, 1964, came the attorney for the Government and the defendant appeared in person and by counsel, Gibson, Dunn & Crutcher by John J. Hanson.

IT IS ADJUDGED that the defendant has been convicted upon his plea of nolo contendere of the offense of engaging in an unlawful combination and conspiracy in restraint of interstate trade and commerce, in violation of Title 15, United States Code, Section 1, as charged in the Indictment and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty [Convicted /s/ B] as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine unto the United States of America in the amount of Five Thousand Dollars ($5,000.00).

IT IS ADJUDGED that the execution of the payment of the fine herein imposed is stayed for ten days.

/s/ Albert Lee Stephens, Jr.
United States District Judge

FILED: June 19, 1964
JOHN A. CHILDRESS, Clerk
by /s/ L. Brosnan
L.A. Brosnan, Deputy

Note: This Judgment amends the Judgment appearing at page 68, *infra.*

Judgment.

United States District Court, Southern District of California, Central Division.

United States of America, vs. United Concrete Pipe Corporation. Criminal No. 33341.

On this 19th day of June, 1964, came the attorney for the Government and the defendant appeared in person and by counsel, Gibson, Dunn & Crutcher by John F. Hanson.

IT IS ADJUDGED that the defendant has been convicted upon his plea of nolo contendere of the offense of engaging in an unlawful combination and conspiracy in restraint of interstate trade and commerce, in violation of Title 15, United States Code, Section 1, as charged in the Indictment and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty [Convicted /s/ B] as charged and convicted:

IT IS ADJUDGED that the defendant pay a fine unto the United States of America in the amount of Five Hundred Dollars ($500.00).

IT IS ADJUDGED that the execution of the payment of the fine herein imposed is stayed for ten days.

/s/ Albert Lee Stephens, Jr.
United States District Judge

FILED: June 19, 1964
JOHN A. CHILDRESS, Clerk
by /s/ L. Brosnan
L. A. Brosnan, Deputy

Judgment.

United States District Court, Southern District o California, Central Division.

United States of America, vs. Kaiser Steel Corpora tion. Criminal No. 33339.

On this 19th day of June, 1964, came the attorne for the Government and the defendant appeared i person and by counsel, Gordon Johnson and James W Baldwin.

IT IS ADJUDGED that the defendant has bee convicted upon his plea of nolo contendere of the of fense of engaging in an unlawful combination and con spiracy in restraint of interstate trade and commerce in violation of Title 15, United States Code, Section 1 as charged in the Indictment and the Court havin asked the defendant whether he had anything to sa why judgment should not be pronounced, and no suffi cient cause to the contrary being shown or appearin to the Court,

IT IS ADJUDGED that the defendant is guilty [Con victed /s/ B] as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine unto the United States of America in the amount of On Thousand Dollars ($1,000.00).

IT IS ADJUDGED that the execution of the pay ment of the fine herein imposed is stayed for ten days.

/s/ Albert Lee Stephens, Jr.
United States District Judge

FILED: June 19, 1964
JOHN A. CHILDRESS, Clerk
by /s/ L. Brosnan
L. A. Brosnan, Deputy

Note: This Judgment amends the Judgment appearing at page 71, *infra*.

Judgment.

United States District Court, Southern District of California, Central Division.

United States of America, vs. Kaiser Steel Corporation. Criminal No. 33340.

On this 19th day of June, 1964, came the attorney for the Government and the defendant appeared in person and by counsel, Gordon Johnson and James Baldwin.

IT IS ADJUDGED that the defendant has been convicted upon his plea of nolo contendere of the offense of engaging in an unlawful combination and conspiracy in restraint of interstate trade and commerce, in violation of Title 15, United States Code, Section 1, as charged in the Indictment and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty [Convicted /s/ B] as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine unto the United States of America in the amount of Two Thousand Dollars ($2,000.00).

IT IS ADJUDGED that the execution of the payment of the fine herein imposed is stayed for ten days.

/s/ Albert Lee Stephens, Jr.
United States District Judge

FILED: June 19, 1964
JOHN A. CHILDRESS, Clerk
by /s/ L. Brosnan
L. A. Brosnan, Deputy

Judgment.

United States District Court, Southern District
California, Central Division.

United States of America, vs. U. S. Industries, In
Charged as United States Industries, Inc. Criminal N
33341.

On this 19th day of June, 1964, came the attorn
for the Government and the defendant appeared
person and by counsel, Paul, Hastings, Janofsky
Walker by Oliver F. Green, Jr.

IT IS ADJUDGED that the defendant has be
convicted upon his plea of nolo contendere of t
offense of engaging in an unlawful combination a
conspiracy in restraint of interstate trade and co
merce, in violation of Title 15, United States Cod
Section 1, as charged in the Indictment and the Cou
having asked the defendant whether he had anythi
to say why judgment should not be pronounced, and
sufficient cause to the contrary being shown or a
pearing to the Court,

IT IS ADJUDGED that the defendant is guilty [Co
victed /s/ B] as charged and convicted.

IT IS ADJUDGED that the defendant pay a fi
unto the United States of America in the amount
Four Thousand Dollars ($4,000.00).

IT IS ADJUDGED that the execution of the pa
ment of the fine herein imposed is stayed for ten day

/s/ Albert Lee Stephens, Jr.
United States District Judge

FILED: June 19, 1964
JOHN A. CHILDRESS, Clerk
by /s/ L. Brosnan
L. A. Brosnan, Deputy

Judgment.

United States District Court, Southern District of California, Central Division.

United States of America, vs. U.S. Industries, Inc., Charged as United States Industries, Inc. Criminal No. 33342.

On this 19th day of June, 1964, came the attorney for the Government and the defendant appeared in person and by counsel, Paul, Hastings, Janofsky & Walker by Oliver F. Green, Jr.

IT IS ADJUDGED that the defendant has been convicted upon his plea of nolo contendere of the offense of engaging in an unlawful combination and conspiracy in restraint of interstate trade and commerce, in violation of Title 15, United States Code, Section 1, as charged in the Indictment and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty [Convicted /s/ B] as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine unto the United States of America in the amount of Four Thousand Dollars ($4,000.00).

IT IS ADJUDGED that the execution of the payment of the fine herein imposed is stayed for ten days.

/s/ Albert Lee Stephens, Jr.
United States District Judge

FILED: June 19, 1964
JOHN A. CHILDRESS, Clerk
by /s/ L. Brosnan
L. A. Brosnan, Deputy

Judgment.

United States District Court, Southern District of California, Central Division.

United States of America, vs. Smith-Scott, Co., Inc., charged as Smith-Scott, Inc. Criminal No. 33341.

On this 19th day of June, 1964, came the attorney for the Government and the defendant appeared in person and by counsel, Gibson, Dunn & Crutcher by John F. Hanson.

IT IS ADJUDGED that the defendant has been convicted upon his plea of nolo contendere of the offense of engaging in an unlawful combination and conspiracy in restraint of interstate trade and commerce, in violation of Title 15, United States Code, Section 1, as charged in the Indictment and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty [Convicted /s/ B] as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine unto the United States of America in the amount of One Thousand Dollars. ($1,000.00)

IT IS ADJUDGED that the execution of the payment of the fine herein imposed is stayed for ten days.

/s/ Albert Lee Stephens, Jr.
United States District Judge

FILED: June 19, 1964
JOHN A. CHILDRESS, Clerk
by /s/ L. Brosnan
L. A. Brosnan, Deputy

Judgment.

United States District Court, Southern District of California, Central Division.

United States of America, vs. Smith-Scott, Co., Inc., charged as Smith-Scott, Inc. Criminal No. 33342.

On this 19th day of June, 1964, came the attorney for the Government and the defendant appeared in person and by counsel, Gibson, Dunn & Crutcher by John F. Hanson.

IT IS ADJUDGED that the defendant has been convicted upon his plea of nolo contendere of the offense of engaging in an unlawful combination and conspiracy in restraint of interstate trade and commerce, in violation of Title 15, United States Code, Section 1, as charged in the Indictment and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty [Convicted /s/ B] as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine unto the United States of America in the amount of One Thousand Dollars ($1,000.00).

IT IS ADJUDGED that the execution of the payment of the fine herein imposed is stayed for ten days.

/s/ Albert Lee Stephens, Jr.
United States District Judge

FILED: June 19, 1964
JOHN A. CHILDRESS, Clerk
by /s/ L. Brosnan
L. A. Brosnan, Deputy

Judgment.

United States District Court, Southern District
California, Central Division.

United States of America, vs. United States St
Corporation. Criminal No. 33339.

On this 19th day of June, 1964, came the attorn
for the Government and the defendant appeared
person and by counsel, Musick, Peeler & Garrett a
Jesse R. O'Malley.

IT IS ADJUDGED that the defendant has been co
victed upon his plea of nolo contendere of the offe
of engaging in an unlawful combination and conspira
in restraint of interstate trade and commerce, in v
lation of Title 15, United States Code, Section 1,
charged in the Indictment and the Court having ask
the defendant whether he had anything to say w
judgment should not be pronounced, and no su
cient cause to the contrary being shown or appeari
to the Court,

IT IS ADJUDGED that the defendant is gui
[Convicted /s/ B] as charged and convicted.

IT IS ADJUDGED that the defendant pay a fi
unto the United States of America in the amount
Two Thousand Dollars ($2,000.00)

IT IS ADJUDGED that the execution of the p
ment of the fine herein imposed is stayed for ten days.

/s/ Albert Lee Stephens, Jr.
United States District Judge

FILED: June 19, 1964
JOHN A. CHILDRESS, Clerk
by /s/ L. Brosnan
L. A. Brosnan, Deputy

Judgment.

United States District Court, Southern District of California, Central Division.

United States of America, vs. United States Steel Corporation. Criminal No. 33340.

On this 19th day of June, 1964, came the attorney for the Government and the defendant appeared in person and by counsel, Musick, Peeler & Garrett and Jesse R. O'Malley.

IT IS ADJUDGED that the defendant has been convicted upon his plea of nolo contendere of the offense of engaging in an unlawful combination and conspiracy in restraint of interstate trade and commerce, in violation of Title 15, United States Code, Section 1, as charged in the Indictment and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty [Convicted /s/ B] as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine unto the United States of America in the amount of One Thousand Dollars ($1,000.00).

IT IS ADJUDGED that the execution of the payment of the fine herein imposed is stayed for ten days.

/s/ Albert Lee Stephens, Jr.
United States District Judge

FILED: June 19, 1964
JOHN A. CHILDRESS, Clerk
by /s/ L. Brosnan
L. A. Brosnan, Deputy

Judgment.

United States District Court, Southern District of California, Central Division.

United States of America, vs. United States Steel Corporation. Criminal No. 33341.

On this 19th day of June, 1964, came the attorney for the Government and the defendant appeared in person and by counsel, Musick, Peeler & Garrett and Jesse R. O'Malley.

IT IS ADJUDGED that the defendant has been convicted upon his plea of nolo contendere of the offense of engaging in an unlawful combination and conspiracy in restraint of interstate trade and commerce, in violation of Title 15, United States Code, Section 1, as charged in the Indictment and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty [Convicted /s/ B] as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine unto the United States of America in the amount of One Thousand Dollars ($1,000.00).

IT IS ADJUDGED that the execution of the payment of the fine herein imposed is stayed for ten days.

/s/ Albert Lee Stephens, Jr.
United States District Judge

FILED: June 19, 1964
JOHN A. CHILDRESS, Clerk
by /s/ L. Brosnan
L. A. Brosnan, Deputy

Judgment.

United States District Court, Southern District of California, Central Division.

United States of America, vs. United States Steel Corporation. Criminal No. 33342.

On this 19th day of June, 1964, came the attorney for the Government and the defendant appeared in person and by counsel, Musick, Peeler & Garrett and Jesse R. O'Malley.

IT IS ADJUDGED that the defendant has been convicted upon his plea of nolo contendere of the offense of engaging in an unlawful combination and conspiracy in restraint of interstate trade and commerce, in violation of Title 15, United States Code, Section 1, as charged in the Indictment and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty [Convicted /s/ B] as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine unto the United States of America in the amount of One Thousand Dollars. ($1,000.00)

IT IS ADJUDGED that the execution of the payment of the fine herein imposed is stayed for ten days.

/s/ Albert Lee Stephens, Jr.
United States District Judge

FILED: June 19, 1964
JOHN A. CHILDRESS, Clerk
by /s/ L. Brosnan
L. A. Brosnan, Deputy

Judgment.

United States District Court, Southern District of California, Central Division.

United States of America vs. United Concrete Pipe Corp. Criminal No. 33340.

On this 19th day of June, 1964, came the attorney for the Government and the defendant appeared in person and by counsel, Gibson, Dunn & Crutcher by John J. Hanson.

IT IS ADJUDGED that the defendant has been convicted upon his plea of nolo contendere of the offense of engaging in an unlawful combination and conspiracy in restraint of interstate trade and commerce, in violation of Title 15, United States Code, Section 1, as charged in the Indictment and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine unto the United States of America in the amount of Five Thousand Dollars ($5,000.00).

IT IS ADJUDGED that the execution of the payment of the fine herein imposed is stayed for ten days.

/s/ Albert Lee Stephens, Jr.
United States District Judge

FILED: June 19, 1964
JOHN A. CHILDRESS, Clerk
by /s /L. Brosnan
L. A. Brosnan, Deputy

Judgment.

United States District Court, Southern District of California, Central Division.

United States of America, vs. American Pipe and Construction Co. Criminal No. 33341.

On this 19th day of June, 1964, came the attorney for the Government and the defendant appeared in person and by counsel, Hill, Farrer & Burrill by Frank MacDowell and Wm. McD. Miller.

IT IS ADJUDGED that the defendant has been convicted upon his plea of nolo contendere of the offense of engaging in an unlawful combination and conspiracy in restraint of interstate trade and commerce, in violation of Title 15, United States Code, Section 1, as charged in the Indictment and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine unto the United States of America in the amount of Seven Thousand Dollars ($7,000.00).

IT IS ADJUDGED that the execution of the payment of the fine herein imposed is stayed for ten days.

/s/ Albert Lee Stephens, Jr.
United States District Judge

FILED: June 19, 1964
JOHN A. CHILDRESS, Clerk
by /s/ L. Brosnan
L. A. Brosnan, Deputy

Judgment.

United States District Court, Southern District of California, Central Division.

United States of America, vs. American Pipe and Construction Co. Criminal No. 33338.

On this 19th day of June, 1964, came the attorney for the Government and the defendant appeared in person and by counsel, Hill, Farrer & Burrill by Frank D. MacDowell and William McD. Miller.

IT IS ADJUDGED that the defendant has been convicted upon his plea of nolo contendere of the offense of engaging in an unlawful combination and conspiracy in restraint of interstate trade and commerce, in violation of Title 15, United States Code, Section 1, as charged in the Indictment and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine unto the United States of America in the amount of Five Thousand Dollars ($5,000.00).

IT IS ADJUDGED that the execution of the payment of the fine herein imposed is stayed for ten days.

/s/ Albert Lee Stephens, Jr.
United States District Judge

FILED: June 19, 1964
JOHN A. CHILDRESS, Clerk
by /s/ L. Brosnan
L. A. Brosnan, Deputy

Judgment.

United States District Court, Southern District of California, Central Division.

United States of America, vs. Kaiser Steel Corporation. Criminal No. 33339.

On this 19th day of June, 1964, came the attorney for the Government and the defendant appeared in person and by counsel, Gordon Johnson and James W. Baldwin.

IT IS ADJUDGED that the defendant has been convicted upon his plea of nolo contendere of the offense of engaging in an unlawful combination and conspiracy in restraint of interstate trade and commerce, in violation of Title 15, United States Code, Section 1, as charged in the Indictment and the Court having asked the defendant whether he had anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant pay a fine unto the United States of America in the amount of One Thousand Dollars ($1,000.00)

IT IS ADJUDGED that the execution of the payment of the fine herein imposed is stayed for ten days.

/s/ Albert Lee Stephens, Jr.
United States District Judge

FILED: June 19, 1964
JOHN A. CHILDRESS, Clerk
by /s/ L. Brosnan
L. A. Brosnan, Deputy

Complaint.

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, vs. American Pipe and Construction Co. and United Concrete Pipe Corp., Defendants. Civil No. 64-832-TC.

The United States of America, plaintiff herein, by its attorneys, brings this civil action against the above-named defendants in two counts. As a first claim, the United States of America, in its capacity as purchaser of concrete pipe for use by those Federal governmental organizations engaged in the construction of systems to convey water and sewage throughout the western area of the United States, brings this suit under the False Claims Act (31 U.S.C. §§ 231-233) for double the amount of damages suffered by it due to defendants' acts, plus forfeitures (Count I). Alternatively, the United States of America in its aforesaid capacity as purchaser of concrete pipe for use by Federal governmental organizations brings this suit under Section 4A of the Clayton Act (15 U.S.C. § 15A) to recover its actual damages (Count II). The plaintiff waives its right of recovery under Counts I and II hereof for any purchase for which it recovers damages under any other complaint concerning related conspiracies filed by the plaintiff concurrently with the filing of this complaint.

COUNT I

1. As a first claim, the United States of America in its capacity as purchaser of concrete pipe for use by those Federal governmental organizations engaged in the construction of systems to convey water and sewage throughout the western area of the United States, brings this suit under Sections 3490, 3491, 3492 and

5438 of the Revised Statutes (31 U.S.C. §§ 231-233), commonly known as the False Claims Act.

2. Each of the defendants maintains an office, transacts business and is found within the Southern District of California.

3. Each of the corporations listed below is made a defendant herein. Each of said corporations is organized and exists under the laws of the State indicated. Each defendant is engaged in the business of manufacturing and of selling concrete pipe principally in the city indicated in the western area.

Name of Company	State of Incorporation	Principal Place of Business
American Pipe and Construction Co. (referred to as American)	California	Monterey Park, California
United Concrete Pipe Corp. (referred to as United)	California	Baldwin Park, California

4. Inasmuch as all defendants are corporations, no defendant is in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States.

5. The acts alleged in this complaint to have been done by each of the defendants were authorized, ordered, or done by the officers, agents, employees, or representatives of each defendant while actively engaged in the management, direction, or control of its affairs.

6. American Concrete Pipe Co. is engaged in the business of manufacturing and of selling concrete pipe in the western area, is a subsidiary of American and is incorporated in the State of Arizona. It and various other companies not made defendants herein, par-

ticipated as co-conspirators in the combination and conspiracy hereinafter charged and have performed acts and made statements in furtherance thereof.

7. As used herein, the term:

(a) "Concrete pipe" means pipe constructed of concrete either with or without metal components, to convey water or sewage, and includes both pressure and nonpressure pipe;

(b) "Metal components" refers to steel sheets, skelp, rods, wire and mesh used in the manufacture of concrete pipe;

(c) "Western area" refers to California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho, and Hawaii; and

(d) "End users" means customers who purchase and install or have installed concrete pipe to transport drinking water and for sanitation, drainage, irrigation, flood control and similar purposes.

8. The construction of systems utilizing concrete pipe is often contracted for by the end user with general contractors on the basis of sealed competitive bids. Prior to submitting such bids, the general contractors solicit quotations from pipe manufacturers for the purchase price of the pipe delivered to the site where the pipe is to be installed. Thus the pipe manufacturer knows who the end user will be. The award winning contractor purchases the pipe from the low quoting pipe manufacturer at the price quoted by the latter and passes this price along to the end user. End users also purchase pipe directly from pipe manufacturers usually on the basis of sealed competitive bids.

9. The corporate defendants are the principal manufacturers of concrete pipe in the western area and during the period 1958 through 1961 their average annual sales of concrete pipe in the western area were at least $41,500,000. Because of the relatively limited number of manufacturers of concrete pipe, general contractors and end users frequently solicit bids for said pipe from manufacturers outside the State where said pipe is to be installed. Manufacturers of said pipe usually manufacture the pipe for a particular job only after receiving an order for it. Said manufacturers customarily identify each section of pipe so as to designate its position in the pipe line and deliver or have delivered said pipe direct to the trench side or as near as possible to the place where it will be installed. During the period of time covered by this complaint, the defendants herein have manufactured substantial quantities of concrete pipe at their plants within the western area, and have sold, shipped, and delivered said pipe to job sites outside the State where it was manufactured. Thus said concrete pipe moves in a continuous and uninterrupted flow from the place of manufacture to points of installation outside the State where said pipe was manufactured.

10. Most concrete pipe, as it is manufactured, is reinforced with metal components both to strengthen the pipe and, particularly with respect to concrete pressure pipe, to make it watertight. The defendant manufacturers purchase said metal components in anticipation of orders or to enable them to fill existing orders for concrete pipe. Substantial quantities of the metal components are produced outside the State where said pipe is manufactured. The movement in interstate commerce of the metal components is necessary

to the manufacture and sale of concrete pipe by the defendants in the western area and the defendants and co-conspirators are conduits through which said metal components flow in a continuous uninterrupted stream in interstate commerce from the place where said components are produced to the place where the components are incorporated into concrete pipe and on to the final site where said pipe is installed.

11. Any restraint upon free competition in the production or sale of concrete pipe in the western area necessarily and directly restrains and affects the interstate flow of concrete pipe and the metal components used in the construction of said pipe.

12. During the period covered by this complaint, the plaintiff through its various executive departments and agencies has purchased substantial quantities of concrete pipe for use in the construction of systems to convey water and sewage throughout the western area of the United States. Plaintiff purchased some amounts of the said concrete pipe pursuant to direct sealed competitive bidding procedures and in accordance with this practice and for the purpose of letting contracts, it advertised and called for bids from pipe manufacturers, including defendants, seeking to supply concrete pipe to plaintiff. Plaintiff has also purchased some amounts of the said concrete pipe pursuant to direct sealed competitive bidding procedures in accordance with which it advertised and called for bids from general contractors seeking to construct systems to convey water and sewage for plaintiff. Said contractors in turn solicited bids and quotations from the pipe manufacturers, including defendants, for the concrete pipe to be used in the said system. The bids or quotations tendered by the pipe manufacturers to the contractors were

incorporated into the sealed bids submitted by the contractors to the plaintiff. The pipe manufacturers, including defendants and co-conspirators, knew that the bids or quotations which they submitted to the contractor for the concrete pipe would be thus incorporated into the bids submitted by the contractor to the plaintiff, that the price of said concrete pipe represented a substantial portion of the entire bid submitted by the contractor to the plaintiff and that said price would be paid by the plaintiff either directly to the pipe manufacturer or to the contractor who, in turn, would pay said price to the pipe manufacturer.

13. Beginning in or prior to the year 1954 and continuing thereafter until at least August 1962, the exact dates being to the plaintiff unknown, defendants, together with the co-conspirators knowingly combined, conspired and agreed to defraud and injure the United States by obtaining or aiding to obtain the payment or allowance of false or fraudulent claims under contracts awarded them for the sale of concrete pipe during said period.

14. The aforesaid combination and conspiracy has consisted, among other things, of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of concrete pipe and to allocate and divide orders for the purchase of concrete pipe among themselves.

15. During the period of time covered by this complaint, the defendants and co-conspirators, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, the following:

(a) In or about 1954 the presidents of American and United, plus a vice president of each defendant, attended several meetings at American's office in South Gate. At these meetings a working agreement which had been in effect for some time between the two companies was reaffirmed. The agreement included the following terms:

(i) that of the total concrete pipe sales made by the two defendants, except for sales in the northwest, approximately 60 per cent would be taken by American and approximately 40 per cent would be taken by United;

(ii) that in the northwest (Washington and Oregon) 55 per cent of the total sales made by the two defendants would be taken by American and 45 per cent would be taken by United;

(iii) that wherever the two defendants encountered competition from other manufacturers of concrete pipe every effort would be made to bring such manufacturers into the conspiracy and allot each a percent of the market based on its historical position within its area of operation;

(iv) that meetings would be held at approximately six month intervals between the presidents of American and United and other representatives of the defendants and co-conspirators to discuss and decide in advance which company would be entitled to submit the lowest bid on each major job known to be scheduled for installation in the near future;

(v) that information would be exchanged regularly between representatives of the defend-

ants and co-conspirators to enable each corporate participant to keep a record of the amount of business secured by each such participant;

(vi) that before final bids or quotations were submitted on each job of any importance, agreement would be reached by representatives of the defendants and co-conspirators on the dollar amount to be bid by each defendant or co-conspirator;

(vii) that bids would be submitted in such a way as to create the semblance of competitive bidding and pricing.

(b) The terms of this agreement were adhered to by the defendants throughout the period of this complaint, except that in or about 1960 or 1961, the exact date being unknown to the plaintiff, the percentage allocation between American and United was changed from a ratio of 60/40 to a ratio of 58/42 in favor of American in all areas outside of the northwest.

16. Pursuant to said combination and conspiracy, and as a result of the acts done in furtherance thereof, defendants have been awarded contracts for the sale of concrete pipe, and have received payments thereunder, on the basis of bids and quotations which they submitted and which they falsely or fraudulently represented to be bona fide, independent, competitive, and not the product of any collusion or agreement between the bidders, and the prices of which bids they further falsely or fraudulently represented to be normal, reasonable and competitive whereas, in fact known to defendants but unknown to plaintiff, the said bids

submitted were sham and collusive and not the result of open competition, and prices therefor were unreasonable, arbitrary, and noncompetitive.

17. With respect to each such contract awarded for the supply of concrete pipe during the aforesaid period of the conspiracy, the defendant to which such contract was awarded presented and/or caused to be presented to plaintiff for payment or approval by it numerous claims, knowing such claims to be false, fictitious or fraudulent in that such claims were based on a contract which had been falsely or fraudulently procured by reason of the aforesaid bidding practice.

18. As a result of the presentment to it of the aforesaid false or fraudulent claims, and without knowledge thereof, plaintiff has paid the false or fraudulent claims to defendants or to contractors to whom defendants submitted bids.

19. As a result of the illegal combination and conspiracy and the defendants' acts in furtherance thereof, plaintiff has been compelled to pay substantially higher prices for concrete pipe than would have been the case but for the illegal conduct complained of herein, and has been financially damaged by defendants, the amount of which is presently undetermined.

20. WHEREFORE, the United States of America:

(a) Demands judgment against defendants for Two Thousand Dollars ($2,000.00) for the said conspiracy, for double the amount of the damages it has sustained, and for such other forfeitures as are allowable by law, as provided in Sections

3490, 3491, 3492 and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233) together with interest thereon and the costs of this suit; and

(b) Prays that it recover such other amounts and have such other and further relief as the Court shall deem just.

COUNT II

21. As an alternative claim, the United States of America, in its aforesaid capacity as purchaser of concrete pipe for use by Federal governmental organizations, brings this suit against the defendants under Section 4A of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731, as amended (15 U.S.C. § 15A), entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, to recover damages which it has sustained due to violations by defendants of Section 1 of the Sherman Act (15 U.S.C. §1).

22. Plaintiff realleges as part of this claim each and all of the allegations contained in 2 and 3, and 5 through 11 of Count I hereof, with like effect as if herein fully repeated.

23. Beginning in or prior to the year 1954 and continuing thereafter until at least August 1962, defendants, together with the co-conspirators, have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in concrete pipe in the western area, in violation of Section 1 of the Sherman Act.

24. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of concrete pipe and to allocate and divide orders for the purchase of concrete pipe among themselves.

25. During the period of time covered by this complaint, the defendants and co-conspirators, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, those acts which are alleged in paragraph 15 of Count I hereof, the allegations of which are realleged in this paragraph, with like effect as if herein fully repeated.

26. The effects of the aforesaid combination and conspiracy were that:

(a) Prices for concrete pipe throughout the western area have been raised, fixed and maintained at high and artificial levels;

(b) Price competition in the sale of concrete pipe throughout the western area has been restrained, suppressed, and eliminated;

(c) Purchasers of concrete pipe throughout the western area have been deprived of the benefits of free competition in the purchase of concrete pipe; and

(d) Public agencies engaged in the construction of systems to convey water and sewage including Federal governmental organizations such as the Bureau of Reclamation and the United

States Army Corps of Engineers, have been forced to pay high artificially fixed prices for concrete pipe.

27. Plaintiff had no knowledge of the said combination and conspiracy, or of any facts which might have led to the discovery thereof until August 1960, and it first became fully aware of the scope of the unlawful conspiracy during the course of the grand jury proceedings which culminated in the return of an indictment in this District against American and United in March 1964. (*United States v. American Pipe and Construction Co. et al.*, Criminal No. 33338.) It could not have uncovered the conspiracy at an earlier date by the exercise of due diligence, inasmuch as the unlawful conspiracy had been fraudulently concealed by defendants.

28. Since at least 1954, plaintiff has purchased substantial quantities of concrete pipe from defendants for use in the western area of the United States. In purchasing said concrete pipe, plaintiff in some instances has invited formal, sealed competitive bids from prospective suppliers, including defendants, and has generally accepted the price offered by the lowest responsible bidder.

29. As a result of the illegal combination and conspiracy alleged herein, plaintiff has been led and induced by defendants to make contract awards on bids solicited by it during the period covered by this complaint at prices fixed by said illegal combination and conspiracy, and plaintiff has been denied thereby the

benefit of unrestricted competition in prices for concrete pipe. By the operation of defendants' agreement and concert of action herein alleged, plaintiff has been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

30. Plaintiff has also purchased concrete pipe under construction contracts with independent contractors who had purchased said concrete pipe from defendants at high, noncompetitive prices. By the operation of defendants' agreements and concert of action herein alleged, plaintiff has been compelled to pay substantially higher prices under said contracts than would have been the case but for the violation of the antitrust laws herein alleged.

31. As a result of the illegal combination and conspiracy alleged herein, plaintiff United States of America has been injured and financially damaged by defendants, in an amount which is presently undetermined.

WHEREFORE, the United States of America:

(a) Prays that the herein alleged combination and conspiracy among defendants be adjudged and decreed to be in unreasonable restraint of interstate trade and commerce and in violation of Section 1 of the Sherman Act;

(b) Demands judgment against defendants for the damages suffered by it due to defendants' violation of the antitrust laws, as provided for in Section 4A of the Clayton Act (15 U.S.C. § 15A), or some lesser amount to the extent that it has

recovery under Count I hereof, together with such interest thereon as is permitted by law and the costs of this suit; and

(c) Prays that it recover such other amounts as the Court shall deem just.

Dated: June 23, 1964.

/s/ Robert F. Kennedy
ROBERT F. KENNEDY
Attorney General

/s/ William H. Orrick, Jr.
WILLIAM H. ORRICK, JR.
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/s/ Harry G. Sklarsky
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Attorneys, Department of Justice

Filed June 23, 1964.

[Endorsement omitted in printing]

Complaint.

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, vs. Kaiser Steel Corporation and United States Steel Corporation, Defendants. Civil No. 64-833-PH.

The United States of America, plaintiff herein, by its attorneys, brings this civil action against the above-named defendants in two counts. As a first claim, the United States of America, in its capacity as purchaser of steel large diameter pressure pipe for use by those Federal governmental organizations engaged in the construction of systems to convey water and sewage throughout the Western Area of the United States, brings this suit under the False Claims Act (31 U.S.C. §§ 231-233) for double the amount of damages suffered by it due to defendants' acts, plus forfeitures (Count I). Alternatively, the United States of America in its aforesaid capacity as purchaser of steel large diameter pressure pipe for use by Federal governmental organizations brings this suit under Section 4A of the Clayton Act (15 U.S.C. § 15A) to recover its actual damages (Count II). The plaintiff waives its right of recovery under Counts I and II hereof for any purchase for which it recovers damages under any other complaint concerning related conspiracies, filed by the plaintiff concurrently with the filing of this complaint.

COUNT I

1. As a first claim, the United States of America in its capacity as purchaser of steel large diameter pressure pipe for use by those Federal governmental organizations engaged in the construction of systems to

convey water and sewage throughout the Western Area of the United States, brings this suit under §§ 3490, 3491, 3492 and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233), commonly known as the False Claims Act.

2. Each of the defendants maintains an office, transacts business and is found within the Southern District of California.

3. Each of the corporations listed below is made a defendant herein. Each of said corporations is organized and exists under the laws of the State indicated. Each defendant is engaged in the business of manufacturing and of selling steel large diameter pressure pipe principally at the place indicated in the Western Area.

Name of Company	State of Incorporation	Principal Place of Business
Kaiser Steel Corporation (Referred to herein as Kaiser)	Nevada	Oakland, California
United States Steel Corporation (Referred to herein as U.S. Steel)	New Jersey	Commerce, California

4. Inasmuch as all defendants are corporations, no defendant is in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States.

5. The acts alleged in this complaint to have been done by each of the defendants were authorized, ordered, or done by the officers, agents, employees, or representatives of each defendant while actively engaged in the management, direction, or control of its affairs.

6. Southwest Welding and Manufacturing Company (referred to herein as Southwest Welding) and

certain officers and employees of Southwest Welding and of the corporate defendants participated as co-conspirators in the combination and conspiracy hereinafter charged and have performed acts and made statements in furtherance thereof.

7. As used herein, the term:

(a) "Steel large diameter pressure pipe," referred to herein as steel LDP pipe, means heavy walled welded steel pipe which is manufactured in diameters of over 24 inches and sold for the conveyance of water or sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch;

(b) "Western Area" refers to California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii; and

(c) "End users" means customers who purchase and install or have installed steel LDP pipe in systems primarily for the conveyance of water or sewage under pressure.

8. Steel LDP pipe is used for the conveyance of drinking water under pressure and for irrigation and sanitation systems. The construction of systems utilizing steel LDP pipe is often contracted for by the end user with general contractors on the basis of sealed competitive bids. Prior to submitting such bids, the general contractors solicit quotations from pipe manufacturers for the purchase price of the pipe delivered to the site where the pipe is to be installed. Thus the pipe manufacturer knows who the end user will be. The award-winning contractor purchases the pipe from the low quoting pipe manufacturer at the price quoted by the latter and passes this price along to the end user. End

users also purchase pipe directly from pipe manufacturers, usually on the basis of sealed competitive bids.

9. The corporate defendants are the principal manufacturers of steel LDP pipe in the Western Area, and during the period 1958 through 1961 their average annual sales of steel LPD pipe in the Western Area were at least $7,000,000. Because of the relatively limited number of manufacturers of steel LDP pipe, general contractors and end users frequently solicit bids for said pipe from manufacturers outside the State where said pipe is to be installed. Manufacturers of said pipe usually manufacture the pipe for a particular job only after receiving an order for it. Said manufacturers customarily identify each section of pipe so as to designate its position in the pipe line and deliver or have delivered said pipe directly to the trench site or as near as possible to the place where it will be installed. During the period of time covered by this complaint, the defendants herein have manufactured substantial quantities of steel LDP pipe at their plants within the Western Area, and have sold, shipped, and delivered said pipe to job sites outside the State where it was manufactured. Thus said steel LDP pipe moves in a continuous and uninterrupted flow from the place of manufacture to points of installation outside the State where said pipe was manufactured.

10. Steel LDP pipe is fabricated largely from steel plate. The defendant manufacturers obtain said steel plate in anticipation of orders or to enable them to fill existing orders for steel LDP pipe. Substantial quantities of said steel plate are produced outside the State where said pipe is manufactured. The movement in interstate commerce of the steel plate is necessary to the manufacture and sale of steel LDP pipe by the

defendants in the Western Area, and the defendants and co-conspirators are conduits through which said steel plate flows in a continuous uninterrupted stream in interstate commerce from the place where said steel plate is produced to the place where it is incorporated into steel LDP pipe and on to the final site where said pipe is installed.

11. Any restraint upon free competition in the production or sale of steel LDP pipe in the Western Area necessarily and directly restrains and affects the interstate flow of steel LDP pipe and the steel plate used in the construction of said pipe.

12. During the period covered by this complaint, the plaintiff through its various executive departments and agencies has purchased substantial quantities of steel LDP pipe for use in the construction of systems to convey water and sewage through the Western Area of the United States. Plaintiff purchased some amounts of the said steel LDP pipe pursuant to direct sealed competitive bidding procedures and in accordance with this practice and for the purpose of letting contracts, it advertised and called for bids from pipe manufacturers, including defendants, seeking to supply steel LDP pipe to plaintiff. Plaintiff has also purchased some amounts of the said steel LDP pipe pursuant to direct sealed competitive bidding procedures in accordance with which it advertised and called for bids from general contractors seeking to construct systems to convey water and sewage for plaintiff. Said contractors in turn solicited bids and quotations from the pipe manufacturers, including defendants, for the steel LDP pipe to be used in the said system. The bids or quotations tendered by the pipe manufacturers to the contractors were incorporated into the sealed bids submitted by the con-

tractors to the plaintiff. The pipe manufacturers, including defendants, knew that the bids or quotations which they submitted to the contractor for the steel LDP pipe would be thus incorporated into the bids submitted by the contractor to the plaintiff, that the price of said steel LDP pipe represented a substantial portion of the entire bid submitted by the contractor to the plaintiff and that said price would be paid by the plaintiff, either directly to the pipe manufacturer or to the contractor who in turn would pay said price to the pipe manufacturer.

13. Beginning sometime prior to the year 1955 and continuing thereafter until at least August 1962, the exact dates being to the plaintiff unknown, defendants, together with the co-conspirators knowingly combined, conspired and agreed to defraud and injure the United States by obtaining or aiding to obtain the payment or allowance of false or fraudulent claims under contracts awarded them for the sale of steel LDP pipe during said period.

14. The aforesaid combination and conspiracy has consisted, among other things, of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of steel LDP pipe and to allocate and divide orders for the purchase of steel LDP pipe among themselves.

15. During the period of time covered by this complaint, the defendants and the co-conspirators, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, the following:

(a) In 1955 several meetings were held at the Statler Hilton and Sheraton-West hotels in Los An-

geles attended by P. M. Cobb and James Greer Thompson of U.S. Steel; Ernest L. Illsley and Homer Barnes of Kaiser; and Monte Lindmoe of Southwest Welding. At these meetings an agreement was reached which included the following terms:

(i) Sales of steel LDP pipe would be divided so that U.S. Steel would obtain 38 per cent, Kaiser 35 per cent, and Southwest Welding 27 per cent of the total of such sales;

(ii) Meetings would be held periodically between representatives of the three companies in Los Angeles and San Francisco to discuss and decide in advance which company would be entitled to submit the lowest bid on each major job known to be scheduled for installation in the near future;

(iii) Information would be exchanged regularly between representatives of the three companies to enable each participant to keep a record of the amount of business secured by each such participant. Tallies were kept by Herb Thoedy in San Francisco and Norman David Lindley in Los Angeles for U.S. Steel;

(iv) Before final bids or quotations were submitted on each job of any importance, agreement would be reached by representatives of the participants on the dollar amount to be bid by each participant;

(v) Bids would be submitted in such a way as to create the semblance of competitive bidding and pricing.

(b) The terms of this agreement were adhered to by the defendants throughout the period of this

complaint, except that in 1961 Southwest Welding was dissolved and U.S. Steel and Kaiser reallocated the business between themselves;

(c) Many phone calls were made between Monte Parker Lindmoe of Southwest Welding; James Greer Thompson, Norman David Lindley, and P. M. Cobb of U.S. Steel; and Homer A. Barnes and Ernest L. Illsley of Kaiser to reach agreement on dollar amounts to be bid on future jobs.

16. Pursuant to said combination and conspiracy, and as a result of the acts done in furtherance thereof, defendants have been awarded contracts for the sale of steel LDP pipe, and have received payments thereunder, on the basis of bids and quotations which they submitted and which they falsely or fraudulently represented to be bona fide, independent, competitive, and not the product of any collusion or agreement between the bidders, and the prices of which bids they further falsely or fraudulently represented to be normal, reasonable and competitive whereas, in fact known to defendants but unknown to plaintiff, the said bids submitted were sham and collusive and not the result of open competition, and prices therefor were unreasonable, arbitrary, and non-competitive.

17. With respect to each such contract awarded for the supply of steel LDP pipe during the aforesaid period of the conspiracy, the defendant to which such contract was awarded presented and/or caused to be presented to plaintiff for payment or approval by it numerous claims, knowing such claims to be false, fictitious, or fraudulent in that such claims were based on a contract which had been falsely or fraudulently procured by reason of the aforesaid bidding practices.

18. As a result of the presentment to it of the aforesaid false or fraudulent claims, and without knowledge thereof, plaintiff has paid the false or fraudulent claims to defendants or contractors to whom defendants submitted bids.

19. As a result of the illegal combination and conspiracy and the defendants' acts in furtherance thereof, plaintiff has been compelled to pay substantially higher prices for steel LDP pipe than would have been the case but for the illegal conduct complained of herein, and has been financially damaged by defendants, the amount of which is presently undetermined.

20. WHEREFORE, the United States of America:

(a) Demands judgment against defendants for Two Thousand Dollars ($2,000) for the said conspiracy, for double the amount of the damages it has sustained, and for such other forfeitures as are allowable by law, as provided in Sections 3490, 3491, 3492 and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233) together with interest thereon and the costs of this suit; and

(b) Prays that it recover such other amounts and have such other and further relief as the Court shall deem just.

COUNT II

21. As an alternative claim, the United States of America, in its aforesaid capacity as purchaser of steel LDP pipe for use by Federal governmental organizations, brings this suit against the defendants under Section 4A of the Act of Congress of October 15, 1914,

c. 323, 38 Stat. 731, as amended (15 U.S.C. § 15A), entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, to recover damages which it has sustained due to violations by defendants of Section 1 of the Sherman Act (15 U.S.C. § 1).

22. Plaintiff realleges as part of this claim each and all of the allegations contained in ¶¶. 2, 3, and 5 through 11 of Count I hereof, with like effect as if herein fully repeated.

23. Beginning prior to the year 1955 and continuing thereafter until at least August 1962, defendants, together with the co-conspirators, have engaged in a combination and conspiracy in unreasonable restraint of aforesaid interstate trade and commerce in steel LDP pipe in the Western Area in violation of Section 1 of the Sherman Act.

24. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of steel LDP pipe and to allocate and divide orders for the purchase of steel LDP pipe among themselves.

25. During the period of time covered by this complaint, the defendants and co-conspirators for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, those acts which are alleged in paragraph 15 of Count I hereof, the allegations of which are realleged in this paragraph with like effect as if herein fully repeated.

26. The effects of the aforesaid combination and conspiracy were that:

(a) Prices for steel LDP pipe throughout the Western Area have been raised, fixed and maintained at high and artificial levels;

(b) Price competition in the sale of steel LDP pipe throughout the Western Area has been restrained, suppressed, and eliminated;

(c) Purchasers of steel LDP pipe throughout the Western Area have been deprived of the benefits of free competition in the purchase of steel LDP pipe; and

(d) Public agencies engaged in the construction of systems to convey water and sewage including Federal governmental organizations such as the Bureau of Reclamation and the United States Army Corps of Engineers, have been forced to pay high artificially fixed prices for steel LDP pipe.

27. Plaintiff had no knowledge of the said combination and conspiracy, or of any facts which might have led to the discovery thereof until August 1960, and it first became fully aware of the scope of the unlawful conspiracy during the course of the grand jury proceedings which culminated in the return of an indictment in this District against Kaiser and United States Steel in March 1964. (*United States v. Kaiser Steel Corporation et al.*, Criminal No. 33339). It could not have uncovered the conspiracy at an earlier date by the exercise of due diligence, inasmuch as the unlawful conspiracy had been fraudulently concealed by defendants.

28. Since at least 1955, plaintiff has purchased substantial quantities of steel LDP pipe from defendants for use in the Western Area of the United States. In purchasing said steel LDP pipe, plaintiff in some in-

stances has invited formal, sealed competitive bids from prospective suppliers, including defendants, and has generally accepted the price offered by the lowest responsible bidder.

29. As a result of the illegal combination and conspiracy alleged herein, plaintiff has been led and induced by defendants to make contract awards on bids solicited by it during the period covered by this complaint at prices fixed by said illegal combination and conspiracy, and plaintiff has been denied thereby the benefit of unrestricted competition in prices for steel LDP pipe. By the operation of defendants' agreement and concert of action herein alleged, plaintiff has been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

30. Plaintiff has also purchased steel LDP pipe under construction contracts with independent contractors who had purchased said steel LDP pipe from defendants at high, noncompetitive prices. By the operation of defendants' agreements and concert of action herein alleged, plaintiff has been compelled to pay substantially higher prices under said contracts than would have been the case but for the violations of the antitrust laws herein alleged.

31. As a result of the illegal combination and conspiracy alleged herein, the plaintiff, United States of America, has been injured and financially damaged by defendants in an amount which is presently undetermined.

WHEREFORE, the United States of America:

(a) Prays that the herein alleged combination and conspiracy among defendants be adjudged and decreed to be in unreasonable restraint of interstate trade and

commerce and in violation of Section 1 of the Sherman Act;

(b) Demands judgment against defendants for the damages suffered by it due to defendants' violation of the antitrust laws, as provided for in Section 4A of the Clayton Act (15 U.S.C. § 15A), or some lesser amount to the extent that it has recovery under Count I hereof, together with such interest thereon as is permitted by law and the costs of this suit; and

(c) Prays that it recover such other amounts as the Court shall deem just.

Dated: June 23, 1964

/s/ Robert F. Kennedy
ROBERT F. KENNEDY
Attorney General

/s/ William H. Orrick, Jr.
WILLIAM H. ORRICK, JR.
Assistant Attorney General

/s/ Harry G. Sklarsky
HARRY G. SKLARSKY
Attorney, Department of Justice

/s/ Francis C. Whelan
FRANCIS C. WHELAN
United States Attorney

/s/ Stanley E. Disney
STANLEY E. DISNEY
Attorney, Department of Justice

/s/ Barbara J. Svedberg
BARBARA J. SVEDBERG

/s/ Donald J. Fallon
DONALD J. FALLON
Attorneys, Department of Justice

Filed June 23, 1964.

[Endorsement omitted in printing]

Complaint.

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, vs. United Concrete Pipe Corp.; American Pipe and Construction Co.; Kaiser Steel Corporation; and United States Steel Corporation, Defendants. Civil No. 64-834-CC.

The United States of America, plaintiff herein, by its attorneys, brings this civil action against the above-named defendants in two counts. As a first claim, the United States of America, in its capacity as purchaser of alternate large diameter pressure pipe for use by those Federal governmental organizations engaged in the construction of systems to convey water and sewage throughout the western area of the United States, brings this suit under the False Claims Act (31 U.S.C. §§231-233) for double the amount of damages suffered by it due to defendants' acts, plus forfeitures (Count I). Alternatively, the United States of America in its aforesaid capacity as purchaser of alternate large diameter pressure pipe for use by Federal governmental organizations brings this suit under Section 4A of the Clayton Act (15 U.S.C. § 15A) to recover its actual damages (Count II). The plaintiff waives its right of recovery under Counts I and II hereof for any purchase for which it recovers damages under any other complaint concerning related conspiracies, filed by the plaintiff concurrently with the filing of this complaint.

Count I

1. As a first claim, the United States of America in its capacity as purchaser of alternate large diameter pressure pipe for use by those Federal governmental organizations engaged in the construction of systems to

convey water and sewage throughout the western area of the United States, brings this suit under 3490, 3491, 3492 and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233), commonly known as the False Claims Act.

2. Each of the defendants maintains an office, transacts business and is found within the Southern District of California.

3. Each of the corporations listed below is made a defendant herein. Each of said corporations is organized and exists under the laws of the State indicated. Each defendant is engaged in the business of manufacturing and of selling alternate large diameter pressure pipe principally in the city indicated in the western area.

Name of Company	State of Incorporation	Principal Place of Business
United Concrete Pipe Co. (Referred to herein as United)	California	Baldwin Park, California
American Pipe and Construction Co. (Referred to herein as American)	California	Monterey Park, California
Kaiser Steel Corporation (Referred to herein as Kaiser)	Nevada	Oakland, California
United States Steel Corporation (Referred to herein as U.S. Steel)	New Jersey	Commerce, California

4. Inasmuch as all defendants are corporations, no defendant is in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States.

5. The acts alleged in this complaint to have been done by each of the defendants were authorized, ordered, or done by the officers, agents, employees, or representatives of each defendant while actively en-

gaged in the management, direction, or control of its affairs.

6. Southwest Welding and Manufacturing Company (referred to herein as Southwest Welding), American Concrete Pipe Co. of Phoenix, Arizona, (referred to herein as American Concrete), Pipe Linings, Inc. and certain officers and employees of said corporations and of the corporate defendants participated as co-conspirators in the combination and conspiracy hereinafter charged and have performed acts and made statements in furtherance thereof.

7. As used herein, the term:

(a) "Steel large diameter pressure pipe," or steel LDP pipe means heavy walled welded steel pipe which is manufactured in diameters of over 24 inches and sold for the conveyance of water or sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch;

(b) "Concrete large diameter pressure pipe," or concrete LDP pipe means concrete pressure pipe, which ordinarily utilizes steel sheets or skelp in its manufacture, in diameters over 24 inches, sold for the conveyance of water and sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch;

(c) "Alternate large diameter pressure pipe" or "alternate LDP pipe" means pipe which is manufactured and sold, or offered for sale in jobs where the specifications permit the use of either concrete LDP pipe or steel LDP pipe;

(d) "Metal components" refers to steel plate, sheets, skelp, rods, wires and mesh used in the production of alternate LDP pipe.

(e) "Western area" refers to California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii; and

(f) "End users" means customers who purchase and install or have installed alternate LDP pipe in systems primarily for the conveyance of water or sewage under pressure.

8. Alternate LDP pipe is used for the conveyance of drinking water under pressure and for irrigation and sanitation systems. The construction of systems utilizing alternate LDP pipe is often contracted for by the end user with general contractors on the basis of sealed competitive bids. The end users draft or have drafted the specifications where this is appropriate, so that either concrete LDP pipe or steel LDP pipe can be used in the system. Prior to submitting bids to the end user, the general contractors solicit quotations from pipe manufacturers for the purchase price of the pipe delivered to the site where the pipe is to be installed. Thus the pipe manufacturer knows who the end user will be. The award-winning contractor purchases the pipe from the low quoting pipe manufacturer at the price quoted by the latter and passes this price along to the end user. End users also purchase pipe directly from pipe manufacturers usually on the basis of sealed competitive bids. The specifications for alternate LDP pipe require that the pipe be lined and/or coated with concrete. When the steel LDP pipe manufacturers plan to submit bids or quotations on an alternate LDP pipe job, they, in turn, solicit quotations or bids from the concrete LDP pipe manufacturers for the performance of this service. The cost of this service is then incorporated in the quotation or bid submitted to the general contractors or end users by the steel LDP pipe manufacturer.

9. The corporate defendants are the principal manufacturers of alternate LDP pipe in the western area and during the period 1958 through 1961 their average annual sales of alternate LDP pipe in the western area were at least $15,000,000. Because of the relatively limited number of manufacturers of alternate LDP pipe, general contractors and end users, where the specifications permit the use of alternate LDP pipe, frequently solicit bids for said pipe from manufacturers outside the State where said pipe is to be installed. Manufacturers of said pipe usually manufacture the pipe for a particular job only after receiving an order for it. Said manufacturers customarily identify each section of pipe so as to designate its position in the pipe line and deliver or have delivered said pipe direct to the trench site or as near as possible to the place where it will be installed. During the period of time covered by this complaint, the defendants herein have manufactured substantial quantities of alternate LDP pipe at their plants within the western area, and have sold, shipped, and delivered said pipe to job sites outside the State where it was manufactured. Thus said alternate LDP pipe moves in a continuous and uninterrupted flow from the place of manufacture to points of installation outside the State where said pipe was manufactured.

10. Substantial quantities of metal components are used in the manufacture of alternate LDP pipe. The defendant manufacturers often obtain said metal components in anticipation of orders or to enable them to fill existing orders for alternate LDP pipe. Substantial quantities of the said metal components are produced outside the State where said pipe is manufactured. The movement in interstate commerce of the metal components is necessary to the manufacture and

sale of alternate LDP pipe by the defendants in the western area and the defendants and co-conspirators are conduits through which said metal components flow in a continuous, uninterrupted stream in interstate commerce from the place where produced to the place where it is incorporated into alternate LDP pipe and on the final site where said pipe is installed.

11. Any restraint upon free competition in the production or sale of alternate LDP pipe in the western area necessarily and directly restrains and affects the interstate flow of alternate LDP pipe and the metal components used in the manufacture of said pipe.

12. During the period covered by this complaint, the plaintiff through its various executive departments and agencies has purchased substantial quantities of alternate LDP pipe for use in the construction of systems to convey water and sewage throughout the western area of the United States. Plaintiff purchased some amounts of the said alternate LDP pipe pursuant to direct sealed competitive bidding procedures and in accordance with this practice and for the purpose of letting contracts, it advertised and called for bids from pipe manufacturers, including defendants, seeking to supply alternate LDP pipe to plaintiff. Plaintiff has also purchased some amounts of the said alternate LDP pipe pursuant to direct sealed competitive bidding procedures in accordance with which it advertised and called for bids from general contractors seeking to construct systems to convey water and sewage for plaintiff. Said contractors in turn solicited bids and quotations from the pipe manufacturers, including defendants, for the alternate LDP pipe to be used in the said system. The bids or quotations tendered by the pipe manufacturers to the contractors were incorporated into

the sealed bids submitted by the contractors to the plaintiff. The pipe manufacturers, including defendants, knew that the bids or quotations which they submitted to the contractor for the alternate LDP pipe would be thus incorporated into the bids submitted by the contractor to the plaintiff, that the price of said alternate LDP pipe represented a substantial portion of the entire bid submitted by the contractor to the plaintiff and that said price would be paid by the plaintiff, either directly to the pipe manufacturer or to the contractor who, in turn, would pay said price to the pipe manufacturer.

13. Beginning sometime prior to the year 1955 and continuing thereafter until at least August 1962, the exact dates being to the plaintiff unknown, defendants, together with the co-conspirators, knowingly combined, conspired and agreed to defraud and injure the United States by obtaining or aiding to obtain the payment or allowance of false or fraudulent claims under contracts awarded them for the sale of alternate LDP pipe during said period.

14. The aforesaid combination and conspiracy has consisted, among other things, of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of alternate LDP pipe and to allocate and divide orders for the purchase of alternate LDP pipe among themselves.

15. During the period of time covered by this complaint, the defendants and the co-conspirators, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, the following:

(a) In or about 1955, meetings were held between P. M. Cobb and James Greer Thompson of U.S. Steel; Ernest L. Illsley and Homer Barnes of Kaiser; Monte Lindmoe of Southwest Welding; Lloyd R. Earl and Richard I. Young of United; and Robert V. Edwards and Elliott E. Brainard of American. At these meetings an agreement was reached or reaffirmed which included the following terms:

(i) that sales of alternate LDP pipe would be divided so that 50 per cent of such sales would be obtained by the manufacturers of concrete LDP pipe and 50 per cent would be obtained by the manufacturers of steel LDP pipe and that the amount of business involved in the lining and coating of the alternate LDP pipe by the concrete LDP pipe manufacturers would be included in the share to be obtained by the concrete LDP pipe manufacturers;

(ii) that the steel LDP pipe manufacturers would not install their own lining and coating facilities but would rely on the concrete LDP pipe manufacturers for this service;

(iii) that meetings would be held periodically between representatives of the steel LDP pipe manufacturers group and concrete LDP pipe manufacturers group in Los Angeles and San Francisco to discuss and decide in advance which group would be entitled to submit the lowest bid on each major job known to be scheduled for installation in the near future;

(iv) that information would be exchanged regularly between representatives of the concrete LDP pipe manufacturers and the steel

LDP pipe manufacturers to enable each group to keep a record of the amount of business secured by each;

(v) that bids would be submitted in such a way as to create the semblance of competitive bidding and pricing;

(b) Many phone calls were made between James Greer Thompson, negotiator for the steel LDP pipe manufacaturers and Elliott E. Brainard, negotiator for the concrete LDP pipe manufacturers to reach agreement on which group would submit the lowest bid on each job.

16. Pursuant to said combination and conspiracy, and as a result of the acts done in furtherance thereof, defendants have been awarded contracts for the sale of alternate LDP pipe, and have received payments thereunder, on the basis of bids and quotations which they submitted and which they falsely or fraudulently represented to be bona fide, independent, competitive, and not the product of any collusion or agreement between the bidders, and the prices of which bids they further falsely or fraudulently represented to be normal, reasonable and competitive whereas, in fact known to defendants but unknown to plaintiff, the said bids submitted were sham and collusive and not the result of open competition, and prices therefor were unreasonable, arbitrary, and noncompetitive.

17. With respect to each such contract awarded for the supply of alternate LDP pipe during the aforesaid period of the conspiracy, the defendant to which such contract was awarded presented and/or caused to be presented to plaintiff for payment or approval by it numerous claims, knowing such claims to be false,

fictitious, or fraudulent in that such claims were based on a contract which had been falsely or fraudulently procured by reason of the aforesaid bidding practices.

18. As a result of the presentment to it of the aforesaid false or fraudulent claims, and without knowledge thereof, plaintiff has paid the false or fraudulent claims to defendants or to contractors to whom defendants submitted bids.

19. As a result of the illegal combination and conspiracy and the defendants' acts in furtherance thereof, plaintiff has been compelled to pay substantially higher prices for alternate LDP pipe than would have been the case but for the illegal conduct complained of herein, and has been financially damaged by defendants, the amount of which is presently undetermined.

20. WHEREFORE, the United States of America:

(a) Demands judgment against defendants for Two Thousand Dollars ($2,000.00) for the said conspiracy, for double the amount of the damages it has sustained, and for such other forfeitures as are allowable by law, as provided in Sections 3490, 3491, 3492 and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233) together with interest thereon and the costs of this suit; and

(b) Prays that it recover such other amounts and have such other and further relief as the Court shall deem just.

Count II

21. As an alternative claim, the United States of America, in its aforesaid capacity as purchaser of alternate LDP pipe for use by Federal governmental organizations, brings this suit against the defendants under

Section 4A of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731, as amended (15 U.S.C. § 15A), entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, to recover damages which it has sustained due to violations by defendants of Section 1 of the Sherman Act (15 U.S.C. § 1).

22. Plaintiff realleges as part of this claim each and all of the allegations contained in 2 and 3, and 5 through 11 of Count I hereof, with like effect as if herein fully repeated.

23. Beginning prior to the year 1955 and continuing thereafter until at least August 1962, defendants, together with the co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in alternate LDP pipe in the western area, in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

24. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of alternate LDP pipe and to allocate and divide orders for the purchase of alternate LDP pipe among themselves.

25. During the period of time covered by this complaint, the defendants and co-conspirators, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, those acts which are alleged in paragraph 15 of Count I hereof, the allegations of which are realleged in this paragraph, with like effect as if herein fully repeated.

26. The effects of the aforesaid combination and conspiracy were that:

(a) Prices for alternate LDP pipe throughout the western area have been raised, fixed, and maintained at high and artificial levels;

(b) Price competition in the sale of alternate LDP pipe throughout the western area has been restrained, suppressed, and eliminated;

(c) Purchasers of alternate LDP pipe throughout the western area have been deprived of the benefits of free competition in the purchase of alternate LDP pipe; and

(d) Public agencies engaged in the construction of systems to convey water and sewage, including Federal governmental organizations such as the Bureau of Reclamation and the United States Army Corps of Engineers, have been forced to pay high artificially fixed prices for alternate LDP pipe.

27. Plaintiff had no knowledge of the said combination and conspiracy, or of any facts which might have led to the discovery thereof until August 1960, and it first became fully aware of the scope of the unlawful conspiracy during the course of the grand jury proceedings which culminated in the return of an indictment in this District against American, United, Kaiser, and U.S. Steel in March 1964. (*United States v. United Concrete Pipe Corp.*, Criminal No. 33340) It could not have uncovered the conspiracy at an earlier date by the exercise of due diligence, inasmuch as the unlawful conspiracy had been fraudulently concealed by defendants.

28. Since at least 1955, plaintiff has purchased substantial quantities of alternate LDP pipe from defendants for use in the western area of the United States. In purchasing said alternate LDP pipe, plaintiff in some

instances has invited formal, sealed competitive bids from prospective suppliers, including defendants, and, has generally accepted the price offered by the lowest responsible bidder.

29. As a result of the illegal combination and conspiracy alleged herein, plaintiff has been led and induced by defendants to make contract awards on bids solicited by it during the period covered by this complaint at prices fixed by said illegal combination and conspiracy, and plaintiff has been denied thereby the benefit of unrestricted competition in prices for alternate LDP pipe. By the operation of defendants' agreement and concert of action herein alleged, plaintiff has been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

30. Plaintiff has also purchased alternate LDP pipe under construction contracts with independent contractors who had purchased said alternate LDP pipe from defendants at high, noncompetitive prices. By the operation of defendants' agreement and concert of action herein alleged, plaintiff has been compelled to pay substantially higher prices under said contracts than would have been the case but for the violations of the antitrust laws herein alleged.

31. As a result of the illegal combination and conspiracy alleged herein, plaintiff, United States of America, has been injured and financially damaged by defendants in an amount which is presently undetermined.

WHEREFORE, the United States of America:

(a) Prays that the herein alleged combination and conspiracy among defendants be adjudged and decreed to be in unreasonable restraint of interstate trade and commerce and in violation of Section 1 of the Sherman Act.

(b) Demands judgment against defendants for the damages suffered by it due to defendants' violation of the antitrust laws, as provided for in Section 4A of the Clayton Act (15 U.S.C. § 15A), or some lesser amount to the extent that it has recovery under Count I hereof, together with such interest thereon as is permitted by law and the costs of this suit; and

(c) Prays that it recover such other amounts as the Court shall deem just.

Dated: June 23, 1964

/s/ Robert F. Kennedy
ROBERT F. KENNEDY
Attorney General

/s/ William H. Orrick, Jr.
WILLIAM H. ORRICK, JR.
Assistant Attorney General

/s/ Harry G. Sklarsky
HARRY G. SKLARSKY
Attorney, Department of Justice

/s/ Francis C. Whelan
FRANCES C. WHELAN
United States Attorney

/s/ Stanley E. Disney
STANLEY E. DISNEY
Attorney, Department of Justice

/s/ Barbara J. Svedberg
BARBARA J. SVEDBERG

/s/ Donald J. Fallon
DONALD J. FALLON
Attorneys, Department of Justice

Filed June 23, 1964.
[Endorsement omitted in printing]

Complaint.

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, vs. U.S. Industries, Inc.; Smith-Scott Co., Inc.; United States Steel Corporation; American Pipe and Construction Co.; and United Concrete Pipe Corp., Defendants. Civil No. 64-835-UB.

The United States of America, plaintiff herein, by its attorneys, brings this civil action against the above-named defendants in two counts. As a first claim, the United States of America, in its capacity as purchaser of alternate small diameter pressure pipe for use by those Federal governmental organizations engaged in the construction of systems to convey water and sewage throughout the western area of the United States, brings this suit under the False Claims Act (31 U.S.C. §§ 231-233) for double the amount of damages suffered by it due to defendants' acts, plus forfeitures (Count I). Alternatively, the United States of America in its aforesaid capacity as purchaser of alternate small diameter pressure pipe for use by said Federal governmental organizations brings this suit under Section 4A of the Clayton Act (15 U.S.C. § 15A) to recover its actual damages (Count II). The plaintiff waives its right of recovery under Counts I and II hereof for any purchase for which it recovers damages under any other complaint concerning related conspiracies, filed by the plaintiff concurrently with the filing of this complaint.

COUNT I

1. As a first claim, the United States of America in its capacity as purchaser of alternate small diameter

pressure pipe for use by those Federal governmental organizations engaged in the construction of systems to convey water and sewage throughout the western area of the United States, brings this suit under Sections 3490, 3491, 3492 and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233), commonly known as the False Claims Act.

2. Each of the defendants maintains an office, transacts business and is found within the Southern District of California.

3. Each of the corporations listed below is made a defendant herein. Each of said corporations is organized and exists under the laws of the State indicated. Each defendant was engaged in the business of manufacturing and of selling alternate small diameter pressure pipe principally in the city indicated in the western area during the time of the conspiracy alleged herein.

Name of Company	State of Incorporation	Place of Business
U.S. Industries Inc. (referred to herein as USI)	Delaware	Azusa, California
Smith-Scott Co. Inc. (referred to herein as Smith-Scott)	California	Riverside, California
United States Steel Corporation (referred to herein as U.S. Steel)	New Jersey	Linden, Utah
American Pipe and Construction Co. (referred to as American)	California	Monterey Park, California
United Concrete Pipe Corp. (referred to as United)	California	Baldwin Park, California

4. Inasmuch as all defendants are corporations, no defendant is in the military or naval forces of the

United States, or in the militia called into or actually employed in the service of the United States.

5. The acts alleged in this complaint to have been done by each of the defendants were authorized, ordered, or done by the officers, agents, employees, or representatives of each defendant while actively engaged in the management, direction, or control of its affairs.

6. American Concrete Pipe Co., engaged in the business of manufacturing and of selling concrete pipe in the western area, is a subsidiary of American and is incorporated in the State of Arizona. It and various other companies not made defendants herein, participated as co-conspirators in the combination and conspiracy hereinafter charged and have performed acts and made statements in furtherance thereof.

7. As used herein, the term:

(a) "Steel small diameter pressure pipe" or "steel SDP pipe" means thin walled welded steel pipe, manufactured from steel plate in diameters of 12 inches to 48 inches and sold for the conveyance of water and sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch;

(b) "Concrete small diameter pressure pipe" or "concrete SDP pipe" means concrete cylinder pipe, which utilizes steel sheets or skelp in its manufacture, in diameters from 12 inches to 48 inches and sold for the conveyance of water or sewage under internal pressure exceeding 115 feet of head or 50 pounds per square inch.

(c) "Alternate small diameter pressure pipe" or "alternate SDP pipe" means pipe which is manufactured and sold, or offered for sale in jobs

where the specifications permit the use of either concrete SDP pipe or steel SDP pipe;

(d) "Metal components" refers to steel plate, sheets, skelp, rods, wire and mesh used in the manufacture of alternate SDP pipe;

(e) "Western area" refers to California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho, and Hawaii; and

(f) "End users" means customers who purchase and install or have installed alternate SDP pipe.

8. The construction of systems utilizing alternate SDP pipe is often contracted for by the end user with general contractors on the basis of sealed competitive bids. The end users draft or have drafted the specifications where this is appropriate, so that either concrete SDP pipe or steel SDP pipe can be used in the system. Prior to submitting bids to the end user, the general contractors solicit quotations from pipe manufacturers for the purchase price of the pipe delivered to the site where the pipe is to be installed. Thus the pipe manufacturer knows who the end user will be. The award winning contractor purchases the pipe from the low quoting pipe manufacturer at the price quoted by the latter and passes this price along to the end user. End users also purchase pipe directly from pipe manufacturers usually on the basis of sealed competitive bids.

9. The corporate defendants are the principal manufacturers of alternate SDP pipe in the western area and during the period 1958 through 1961 their average annual sales of alternate SDP pipe in the western area were at least $18,000,000. Because of the relatively limited number of manufacturers of alternate SDP pipe,

general contractors and end users where the specifications permit the use of alternate SDP pipe, frequently solicit bids both from manufacturers of concrete SDP pipe and from manufacturers of steel SDP pipe, and frequently they solicit bids for said pipe from manufacturers outside the State where said pipe is to be installed. Manufacturers of said pipe usually manufacture the pipe for a particular job only after receiving an order for it. Said manufacturers customarily identify each section of pipe so as to designate its position in the pipe line and deliver or have delivered said pipe direct to the trench site or as near as possible to the place where it will be installed. During the period of time covered by this complaint, the defendants herein have manufactured substantial quantities of alternate SDP pipe at their plants within the western area, and have sold, shipped, and delivered said pipe to job sites outside the State where it was manufactured. Thus said alternate SDP pipe moved in a continuous and uninterrupted flow from the place of manufacture to points of installation outside the State where said pipe was manufactured.

10. Substantial quantities of metal components are used in the manufacture of alternate SDP pipe. The defendant manufacturers purchase said metal components in anticipation of orders or to enable them to fill existing orders for alternate SDP pipe. Substantial quantities of the metal components are produced outside the State where said pipe is manufactured. The movement in interstate commerce of the metal components is necessary to the manufacture and sale of alternate SDP pipe by the defendants in the western area and the defendants and co-conspirators are conduits through which said metal components flow in a

continuous uninterrupted stream in interstate commerce from the place where said components are produced to the place where the components are incorporated into alternate SDP pipe and on to the final site where said pipe is installed.

11. Any restraint upon free competition in the production or sale of alternate SDP pipe in the western area necessarily and directly restrains and affects the interstate flow of concrete pipe and the metal components used in the construction of said pipe.

12. During the period covered by this complaint, the plaintiff through its various executive departments and agencies has purchased substantial quantities of alternate SDP pipe for use in the construction of systems to convey water and sewage throughout the western area of the United States. Plaintiff purchased some amounts of the said alternate SDP pipe pursuant to direct sealed competitive bidding procedures and in accordance with this practice and for the purpose of letting contracts, it advertised and called for bids from pipe manufacturers, including defendants, seeking to supply alternate SDP pipe to plaintiff. Plaintiff has also purchased some amounts of the said alternate SDP pipe pursuant to direct sealed competitive bidding procedures in accordance with which it advertised and called for bids from general contractors seeking to construct systems to convey water and sewage for plaintiff. Said contractors in turn solicited bids and quotations from the pipe manufacturers, including defendants, for the alternate SDP pipe to be used in the said system. The bids or quotations tendered by the pipe manufacturers to the contractors were incorporated into the sealed bids submitted by the contractors to the plaintiff. The pipe manufacturers, including defendants and

co-conspirators, knew that the bids or quotations which they submitted to the contractor for the alternate SDP pipe would be thus incorporated into the bids submitted by the contractor to the plaintiff, that the price of said alternate SDP pipe represented a substantial portion of the entire bid submitted by the contractor to the plaintiff and that said price would be paid by the plaintiff either directly to the pipe manufacturer or to the contractor who, in turn, would pay said price to the pipe manufacturer.

13. Beginning in or prior to the year 1955 and continuing thereafter until at least January 1962, the exact dates being to the plaintiff unknown, defendants, together with the co-conspirator knowingly combined, conspired and agreed to defraud and injure the United States by obtaining or aiding to obtain the payment or allowance of false or fraudulent claims under contracts awarded them for the sale of alternate SDP pipe during said period.

14. The aforesaid combination and conspiracy has consisted, among other things, of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of alternate SDP pipe and to allocate and divide orders for the purchase of alternate SDP pipe among themselves.

15. During the period of time covered by this complaint, the defendants and co-conspirators, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, the following:

(a) In or before 1955 representatives of the alternate SDP pipe manufacturers reached an agreement which included the following terms:

(i) that sales of alternate SDP pipe would be divided so that a certain per cent of such sales would be obtained by the manufacturers of steel SDP pipe;

(ii) that information would be exchanged regularly between representatives of the concrete SDP pipe manufacturers and representatives of the steel SDP pipe manufacturers to enable each group to keep a record of the amount of business secured by each;

(iii) that bids would be submitted in such a way as to create the semblance of competitive bidding and pricing.

(b) The terms of this agreement were adhered to by the defendants and co-conspirators throughout the period of this complaint except that the percentage ratios were changed from time to time by agreement between the defendants and co-conspirators.

(c) At various times throughout the period of the conspiracy, Charles Eugene Lamar, John Harvey Barbazette and D. N. Chamberlain acted as "negotiators" for the steel SDP pipe manufacturers and Richard J. McConnell, Peter Van Kuran, Lawrence Robert Tollenaere and Corliss Dean acted as "negotiators" for the concrete SDP pipe manufacturers. These individuals passed along information to other members of their groups as to which group was "in line" for each job as it arose;

(d) Tallies were maintained by representatives of each corporate defendant for the purpose of keeping a record of whether a steel SDP pipe manufacturer or a concrete SDP pipe manufacturer obtained each job.

(e) Jobs for end users were allocated to the steel SDP pipe group or the concrete SDP pipe group of manufacturers at meetings or by telephone conversations between representatives of defendants and co-conspirators.

16. Pursuant to said combination and conspiracy, and as a result of the acts done in furtherance thereof, defendants have been awarded contracts for the sale of alternate SDP pipe, and have received payments thereunder, on the basis of bids and quotations which they submitted and which they falsely or fraudulently represented to be bona fide, independent, competitive, and not the product of any collusion or agreement between the bidders, and the prices of which bids they falsely or fraudulently represented to be normal, reasonable and competitive whereas, in fact, known to defendants but unknown to plaintiff, the said bids submitted were sham and collusive and not the result of open competition, and prices therefor were unreasonable, arbitrary and noncompetitive.

17. With respect to each such contract awarded for the supply of alternate SDP pipe during the aforesaid period of the conspiracy, the defendant to which such contract was awarded presented and/or caused to be presented to plaintiff for payment or approval by it numerous claims, knowing such claims to be false, fictitious or fraudulent in that such claims were based on a contract which had been falsely or fraudulently procured by reason of the aforesaid bidding practices.

18. As a result of the presentment to it of the aforesaid false or fraudulent claims, and without knowledge thereof, plaintiff has paid the false or fraudulent claims to defendants or to contractors to whom defendants submitted bids.

19. As a result of the illegal combination and conspiracy and the defendants' acts in furtherance thereof, plaintiff has been compelled to pay substantially higher prices for alternate SDP pipe than would have been the case but for the illegal conduct complained of herein, and has been financially damaged by defendants, the amount of which is presently undetermined.

20. WHEREFORE, the United States of America:

(a) Demands judgment against defendants for Two Thousand Dollars ($2,000.00) for the said conspiracy, for double the amount of the damages it has sustained, and for such other forfeitures as are allowable by law, as provided in Sections 3490, 3491, 3492 and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233) together with interest thereon and the costs of this suit; and

(b) Prays that it recover such other amounts and have such other and further relief as the Court shall deem just.

COUNT II

21. As an alternative claim, the United States of America, in its aforesaid capacity as purchaser of alternate SDP pipe for use by Federal governmental organizations, brings this suit against the defendants under Section 4A of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731, as amended (15 U.S.C. § 15A), entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, to recover damages which it has sustained due to violations by defendants of Section 1 of the Sherman Act (15 U.S.C. § 1).

22. Plaintiff realleges as part of this claim each and all of the allegations contained in 2 and 3, and 5 through 11 of Count I hereof, with like effect as if herein fully repeated.

23. Beginning in or prior to the year 1955 and continuing thereafter until at least January 1962, defendants, together with the co-conspirators, have engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in alternate SDP pipe in the western area, in violation of Section 1 of the Sherman Act.

24. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of alternate SDP pipe and to allocate and divide orders for the purchase of alternate SDP pipe among themselves.

25. During the period of time covered by this complaint, the defendants and co-conspirators, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, those acts which are alleged in paragraph 15 of Count I hereof, the allegations of which are realleged in this paragraph, with like effect as if herein fully repeated.

26. The effects of the aforesaid combination and conspiracy were that:

(a) Prices for alternate SDP pipe throughout the western area have been raised, fixed and maintained at high and artificial levels;

(b) Price competition in the sale of alternate SDP pipe throughout the western area has been restrained, suppressed, and eliminated;

(c) Purchasers of alternate SDP pipe throughout the western area have been deprived of the benefits of free competition in the purchase of alternate SDP pipe; and

(d) Public agencies engaged in the construction of systems to convey water and sewage including Federal governmental organizations such as the Bureau of Reclamation and the United States Army Corps of Engineers, have been forced to pay high artificially fixed prices for alternate SDP pipe.

27. Plaintiff had no knowledge of the said combination and conspiracy, or of any facts which might have led to the discovery thereof until August 1960, and it first became fully aware of the scope of the unlawful conspiracy during the course of the grand jury proceedings which culminated in the return of an indictment in this District against USI, Smith-Scott, U. S. Steel, American and United in March 1964. (*United States v. United States Industries, Inc.*, Criminal No. 33341.) It could not have uncovered the conspiracy at an earlier date by the exercise of due diligence, inasmuch as the unlawful conspiracy had been fraudulently concealed by defendants.

28. Since at least 1954, plaintiff has purchased substantial quantities of alternate SDP pipe from defendants for use in the western area of the United States. In purchasing said alternate SDP pipe, plaintiff in some instances has invited formal, sealed competitive bids from prospective suppliers, and has generally accepted the price offered by the lowest responsible bidder.

29. As a result of the illegal combination and conspiracy alleged herein, plaintiff has been led and induced by defendants to make contract awards on bids

solicited by it during the period covered by this complaint at prices fixed by said illegal combination and conspiracy, and plaintiff has been denied thereby the benefit of unrestricted competition in prices for alternate SDP pipe. By the operation of defendants' agreement and concert of action herein alleged, plaintiff has been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

30. Plaintiff has also purchased alternate SDP pipe under construction contracts with independent contractors who had purchased said alternate SDP pipe from defendants at high, noncompetitive prices. By the operation of defendants' agreements and concert of action herein alleged, plaintiff has been compelled to pay substantially higher prices under said contracts than would have been the case but for the violations of the antitrust laws herein alleged.

31. As a result of the illegal combination and conspiracy alleged herein, plaintiff United States of America has been injured and financially damaged by defendants, in an amount which is presently undetermined.

WHEREFORE, the United States of America:

(a) Prays that the herein alleged combination and conspiracy among defendants be adjudged and decreed to be in unreasonable restraint of interstate trade and commerce and in violation of Section 1 of the Sherman Act;

(b) Demands judgment against defendants for the damages suffered by it due to defendants' violation of the antitrust laws, as provided for in Section 4A of the Clayton Act (15 U.S.C. § 15A), or some lesser amount to the extent that it has recov-

ery under Count I hereof, together with such interest thereon as is permitted by law and the costs of this suit; and

(c) Prays that it recover such other amounts as the Court shall deem just.

Dated: June 23, 1964

/s/ Robert F. Kennedy
ROBERT F. KENNEDY
Attorney General

/s/ William H. Orrick, Jr.
WILLIAM H. ORRICK, JR.
Assistant Attorney General

/s/ Harry G. Sklarsky
HARRY G. SKLARSKY
Attorney, Department of Justice

/s/ Francis C. Whelan
FRANCIS C. WHELAN
United States Attorney

/s/ Stanley E. Disney
STANLEY E. DISNEY
Attorney, Department of Justice

/s/ Barbara J. Svedberg
BARBARA J. SVEDBERG

/s/ Donald J. Fallon
DONOLD D. FALLON
Attorneys, Department of Justice

Filed June 23, 1964.

[Endorsement omitted in printing]

Complaint.

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, vs. United States Steel Corporation; Smith-Scott Co., Inc.; U.S. Industries, Inc., Defendants. Civil No. 64-836-LAC.

The United States of America, plaintiff herein, by its attorneys, brings this civil action against the above-named defendants in two counts. As a first claim, the United States of America, in its capacity as purchaser of steel small diameter pressure pipe for use by those Federal governmental organizations engaged in the construction of systems to convey water and sewage throughout the western area of the United States, brings this suit under the False Claims Act (31 U.S.C. §§ 231-233) for double the amount of damages suffered by it due to defendants' acts, plus forfeitures (Count I). Alternatively, the United States of America in its aforesaid capacity as purchaser of small diameter pressure pipe for use by Federal governmental organizations brings this suit under Section 4A of the Clayton Act (15 U.S.C. §15A) to recover its actual damages (Count II). The plaintiff waives its right of recovery under Counts I and II hereof for any purchase for which it recovers damages under any other complaint concerning related conspiracies, filed by the plaintiff concurrently with the filing of this complaint.

Count I

1. As a first claim, the United States of America, in its capacity as purchaser of steel small diameter pressure pipe for use by those Federal governmental organizations engaged in the construction of systems to convey water and sewage throughout the western

area of the United States, brings this suit under 3490, 3491, 3492 and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233), commonly known as the False Claims Act.

2. Each of the defendants maintains an office, transacts business and is found within the Southern District of California.

3. Each of the corporations listed below is made a defendant herein. Each of said corporations is organized and exists under the laws of the State indicated. Each defendant is engaged in the business of manufacturing and of selling steel small diameter pressure pipe principally in the city indicated in the western area.

Name of Company	State of Incorporation	Place of Business
United States Steel Corporation (referred to herein as U.S. Steel)	New Jersey	Linden, Utah
Smith-Scott Co., Inc. (referred to herein as Smith-Scott)	California	Riverside, California
U.S. Industries, Inc. (referred to herein as USI)	Delaware	Azusa, California

4. Inasmuch as all defendants are corporations, no defendant is in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States.

5. The acts alleged in this complaint to have been done by each of the defendants were authorized, ordered, or done by the officers, agents, employees, or representatives of each defendant while actively engaged in the management, direction, or control of its affairs.

6. Certain officers and employees of the corporate defendants participated as co-conspirators in the combination and conspiracy hereinafter charged and have performed acts and made statements in furtherance thereof.

7. As used herein, the term:

(a) "Steel small diameter pressure pipe," (referred to herein as steel SDP pipe), means thin walled welded steel pipe which is manufactured in diameters of 4 inches to 48 inches and sold for the conveyance of water or sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch;

(b) "Western Area" refers to California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii; and

(c) "End users" means customers who purchase and install or have installed steel SDP pipe in systems primarily for the conveyance of water or sewage under pressure.

8. Steel SDP pipe is used for the conveyance of drinking water under pressure and for irrigation and sanitation systems. The construction of systems utilizing steel SDP pipe is often contracted for by the end user with general contractors on the basis of sealed competitive bids. Prior to submitting such bids, the general contractors solicit quotations from pipe manufacturers for the purchase price of the pipe delivered to the site where the pipe is to be installed. Thus the pipe manufacturer knows who the end user will be. The award-winning contractor purchases the pipe from the low quoting pipe manufacturer at the price quoted by the latter and passes this price along to the end user. End

users also purchase pipe directly from pipe manufacturers usually on the basis of sealed competitive bids.

9. The corporate defendants are the principal manufacturers of steel SDP pipe in the western area and during the period 1958 through 1961 their average annual sales of concrete pipe in the western area were at least $13,500,000. Because of the relatively limited number of manufacturers of steel SDP pipe, general contractors and end users frequently solicit bids for said pipe from manufacturers outside the State where said pipe is to be installed. Manufacturers of said pipe usually manufacture the pipe for a particular job only after receiving an order for it. Said manufacturers customarily identify each section of pipe so as to designate its position in the pipe line and deliver or have delivered said pipe direct to the trench site or as near as possible to the place where it will be installed. During the period of time covered by this complaint, the defendants herein have manufactured substantial quantities of steel SDP pipe at their plants within the western area, and have sold, shipped, and delivered said pipe to job sites outside the State where it was manufactured. Thus said steel SDP pipe moves in a continuous and uninterrupted flow from the place of manufacture to points of installation outside the State where said pipe was manufactured.

10. Steel SDP pipe is fabricated largely from steel plate. The defendant manufacturers obtain said steel plate in anticipation of orders or to enable them to fill existing orders for steel SDP pipe. Substantial quantities of the said steel plate are produced outside the State where said pipe is manufactured. The movement in interstate commerce of the steel plate is necessary to the manufacture and sale of steel SDP pipe by the defendants in the western area and the defendants and co-

conspirators are conduits through which said steel plate flows in a continuous uninterrupted stream in interstate commerce from the place where said steel plate is produced to the place where it is incorporated into steel SDP pipe and on to the final site where said pipe is installed.

11. Any restraint upon free competition in the production or sale of steel SDP pipe in the western area necessarily and directly restrains and affects the interstate flow of steel SDP pipe and the steel plate used in the construction of said pipe.

12. During the period covered by this complaint, the plaintiff through its various executive departments and agencies has purchased substantial quantities of steel SDP pipe for use in the construction of systems to convey water and sewage throughout the western area of the United States. Plaintiff purchases some amounts of the said steel SDP pipe pursuant to direct sealed competitive bidding procedures and in accordance with this practice and for the purpose of letting contracts, it advertised and called for bids from pipe manufacturers, including defendants, seeking to supply steel SDP pipe to plaintiff. Plaintiff has also purchased some amounts of the said steel SDP pipe pursuant to direct sealed competitive bidding procedures in accordance with which it advertised and called for bids from general contractors seeking to construct systems to convey water and sewage for plaintiff. Said contractors in turn solicited bids and quotations from the pipe manufacturers, including defendants, for the steel SDP pipe to be used in the said system. The bids or quotations tendered by the pipe manufacturers to the contractors were incorporated into the sealed bids submitted by the contractors to the plaintiff. The pipe manufacturers, including defendants, knew that the bids or quota-

tions which they submitted to the contractor for the steel SDP pipe would be thus incorporated into the bids submitted by the contractor to the plaintiff, that the price of said steel SDP pipe represented a substantial portion of the entire bid submitted by the contractor to the plaintiff and that said price would be paid by the plaintiff either directly to the pipe manufacturer or to the contractor who, in turn, would pay said price to the pipe manufacturer.

13. Beginning at least as early as May 1958, and continuing thereafter until at least January 1962, the exact dates being to the plaintiff unknown, defendants, together with the co-conspirator, knowingly combined, conspired and agreed to defraud and injure the United States by obtaining or aiding to obtain the payment or allowance of false or fraudulent claims under contracts awarded them for the sale of steel SDP pipe during said period.

14. The aforesaid combination and conspiracy has consisted, among other things, of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of steel SDP pipe and to allocate and divide orders for the purchase of steel SDP pipe among themselves.

15. During the period of time covered by this complaint, the defendants and the co-conspirators, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, the following:

(a) In or about 1958 several meetings were held in P. M. Cobb's suite at the Sheraton-West Hotel in Los Angeles attended by P. M. Cobb and J. G. Thompson of U. S. Steel; Paul Allen Wing

and William Scott of Smith-Scott; and Don Chamberlain and Charles Eugene Lamar of U.S.I. At these meetings an agreement was reached which included the following terms:

(i) Each company would be entitled to only a certain percentage of the available business in steel SDP pipe in different geographical areas;

(ii) Limitations were placed on the sizes and types of steel SDP pipe each defendant would be allowed to manufacture in the future;

(iii) Meetings would be held between representatives of the three defendants to discuss and decide in advance which defendant would be entitled to submit the lowest bid on each major job known to be scheduled for installation in the near future;

(iv) Information would be exchanged regularly between representatives of the three companies to enable each participant to keep a record of the amount of business secured by each participant;

(v) Before final bids or quotations were submitted on each job of any importance, agreement would be reached by representatives of the participants on the dollar amount to be bid by each participant based on minimum discounts from standardized price lists;

(vi) Bids would be submitted in such a way as to create the semblance of competitive bidding and pricing;

(b) The terms of this agreement were adhered to by the defendants throughout the period of this complaint except that the percentage ratios were changed from time to time by agreement among the defendants;

(c) Subsequent meetings were held at various locations including the Sheraton-West Hotel in Los Angeles and the Uplander Hotel in Upland, California, and numerous phone calls were made between representatives of defendants at which future jobs were discussed by James Greer Thompson and Norman David Lindley of U.S. Steel; Charles Eugene Lamar, D. N. Chamberlain, John Harvey Barbazette, and John Allan Ellis of USI; and Frank Cook and Paul Allen Wing of Smith-Scott.

16. Pursuant to said combination and conspiracy, and as a result of the acts done in furtherance thereof, defendants have been awarded contracts for the sale of steel SDP pipe, and have received payments thereunder, on the basis of bids and quotations which they submitted and which they falsely or fraudulently represented to be bona fide, independent, competitive, and not the product of any collusion or agreement between the bidders, and the prices of which bids they further falsely or fraudulently represented to be normal, reasonable and competitive whereas, in fact known to defendants but unknown to plaintiff, the said bids submitted were sham and collusive and not the result of open competition, and prices therefor were unreasonable, arbitrary, and noncompetitive.

17. With respect to each such contract awarded for the supply of steel SDP pipe during the aforesaid period of the conspiracy, the defendant to which such contract was awarded presented and/or caused to be presented to plaintiff for payment or approval by its numerous claims, knowing such claims to be false, fictitious or fraudulent in that such claims were based on a contract which had been falsely or fraudulently procured by reason of the aforesaid bidding practices.

18. As a result of the presentment to it of the aforesaid false or fraudulent claims, and without knowledge thereof, plaintiff has paid the false or fraudulent claims to defendants or contractors to whom defendants submitted bids.

19. As a result of the illegal combination and conspiracy and the defendants' acts in furtherance thereof, plaintiff has been compelled to pay substantially higher prices for steel SDP pipe than would have been the case but for the illegal conduct complained of herein, and has been financially damaged by defendants, the amount of which is presently undetermined.

20. WHEREFORE, the United States of America:

(a) Demands judgment against defendants for Two Thousand Dollars ($2,000.00) for the said conspiracy, for double the amount of the damages it has sustained, and for such other forfeitures as are allowable by law, as provided in Sections 3490, 3491, 3492 and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233) together with interest thereon and the costs of this suit; and

(b) Prays that it recover such other amounts and have such other and further relief as the Court shall deem just.

Count II

21. As an alternative claim, the United States of America, in its aforesaid capacity as purchaser of steel SDP pipe for use by Federal governmental organizations, brings this suit against the defendants under Section 4A of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731, as amended (15 U.S.C. § 15A), entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other pur-

poses," commonly known as the Clayton Act, to recover damages which it has sustained due to violations by defendants of Section 1 of the Sherman Act (15 U.S.C. § 1).

22. Plaintiff realleges as part of this claim each and all of the allegations contained in 2 and 3, and 5 through 11 of Count I hereof, with like effect as if herein fully repeated.

23. Beginning at least as early as May 1958, and continuing thereafter until at least January 1962, defendants, together with the co-conspirators, have engaged in a combination and conspiracy in unreasonable restraint of interstate commerce in steel SDP pipe in the western area, in violation of Section 1 of the Sherman Act.

24. The aforesaid combination and conspiracy has consisted of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of steel SDP pipe and to allocate and divide orders for the purchase of steel SDP pipe among themselves.

25. During the period of time covered by this complaint, the defendants and co-conspirators, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, those acts which are alleged in paragraph 15 of Count I hereof, the allegations of which are realleged in this paragraph, with like effect as if herein fully repeated.

26. The effects of the aforesaid combination and conspiracy were that:

(a) Prices for steel SDP pipe throughout the western area have been raised, fixed and maintained at high and artificial levels;

(b) Price competition in the sale of steel SDP pipe throughout the western area has been restrained, suppressed, and eliminated;

(c) Purchasers of steel SDP pipe throughout the western area have been deprived of the benefits of free competition in the purchase of steel SDP pipe; and

(d) Public agencies engaged in the construction of systems to convey water and sewage including Federal governmental organizations such as the Bureau of Reclamation and the United States Army Corps of Engineers, have been forced to pay high artificially fixed prices for steel SDP pipe.

27. Plaintiff had no knowledge of the said combination and conspiracy, or of any facts which might have led to the discovery thereof until August 1960, and it first became fully aware of the scope of the unlawful conspiracy during the course of the grand jury proceedings which culminated in the return of an indictment in this District against U.S. Steel, Smith-Scott, and USI in March 1964. (*United States v. United States Steel Corporation,* Criminal No. 33342). It could not have uncovered the conspiracy at an earlier date by the exercise of due diligence, inasmuch as the unlawful conspiracy had been fraudulently concealed by defendants.

28. Since at least 1955, plaintiff has purchased substantial quantities of steel SDP pipe from defendants for use in the western area of the United States. In purchasing said steel SDP pipe, plaintiff in some instances has invited formal, sealed competitive bids from prospective suppliers, including defendants, and has generally accepted the price offered by the lowest responsible bidder.

29. As a result of the illegal combination and conspiracy alleged herein, plaintiff has been led and induced by defendants to make contract awards on bids solicited by it during the period covered by this complaint at prices fixed by said illegal combination and conspiracy, and plaintiff has been denied thereby the benefit of unrestricted competition in prices for steel SDP pipe. By the operation of defendants' agreement and concert of action herein alleged, plaintiff has been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

30. Plaintiff has also purchased steel SDP pipe under construction contracts with independent contractors who had purchased said steel SDP pipe from defendants at high, noncompetitive prices. By the operation of defendants' agreements and concert of action herein alleged, plaintiff has been compelled to pay substantially higher prices under said contracts than would have been the case but for the violations of the antitrust laws herein alleged.

31. As a result of the illegal combination and conspiracy alleged herein, the plaintiff, United States of America, has been injured and financially damaged by defendants, in an amount which is presently undetermined.

WHEREFORE, the United States of America:

(a) Prays that the herein alleged combination and conspiracy among defendants be adjudged and decreed to be in unreasonable restraint of interstate trade and commerce and in violation of Section 1 of the Sherman Act.

(b) Demands judgment against defendants for the damages suffered by it due to defendants' violation of

the antitrust laws, as provided for in Section 4A of the Clayton Act (15 U.S.C. § 15A), or some lesser amount to the extent that it has recovery under Count I hereof, together with such interest thereon as is permitted by law and the costs of this suit; and

(c) Prays that it recover such other amounts as the Court shall deem just.

Dated: June 23, 1964.

/s/ Robert F. Kennedy
ROBERT F. KENNEDY
Attorney General

/s/ William H. Orrick, Jr.
WILLIAM H. ORRICK, JR.
Assistant Attorney General

/s /Harry G. Sklarsky
HARRY G. SKLARSKY
Attorney, Department of Justice

/s/ Francis C. Whelan
FRANCIS C. WHELAN
United States Attorney

/s/ Stanley E. Disney
STANLEY E. DISNEY
Attorney, Department of Justice

/s/ Barbara J. Svedberg
BARBARA J. SVEDBERG

/s/ Donald J. Fallon
DONALD J. FALLON
Attorneys, Department of Justice

Filed June 23, 1964.

[Endorsement omitted in printing]

First Amended Complaint.

(Injunction and Money Damages).

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, vs. American Pipe and Construction Co. and United Concrete Pipe Corp. Defendants. Civil No. 64-832-HW.

The United States of America, plaintiff herein, by its attorneys, brings this action against the defendants named herein in three counts. As a first claim the United States of America in its capacity as purchaser of concrete pipe for use by Federal agencies, brings this suit under the False Claims Act (31 U.S.C. §§ 231-233) for double the amount of damages sustained, plus forfeitures (Count One), and as a second claim, alternatively, under Section 4A of the Clayton Act (15 U.S.C. § 15A) to recover its actual damages (Count Two). The plaintiff waives its right of recovery under Counts I and II hereof for any purchase for which it recovers damages under any other complaint concerning related conspiracies, filed by the plaintiff concurrently with the filing of this complaint.

As a third claim, the United States of America brings this suit under Section 4 of the Sherman Act (15 U.S.C. §4), in order to prevent and restrain continuing violation by the defendants, as hereinafter alleged, of Section 1 of said Act (15 U.S.C. § 1) (Count Three).

COUNT I

1. As a first claim, the United States of America in its capacity as purchaser of concrete pipe for use by those Federal governmental organizations engaged in the construction of systems to convey water and sewage

throughout the western area of the United States, bring this suit under Sections 3490, 3491, 3492 and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233), commonly known as the False Claims Act.

2. Each of the defendants maintains an office, transacts business and is found within the Southern District of California.

3. Each of the corporations listed below is made a defendant herein. Each of said corporations is organized and exists under the laws of the State indicated. Each defendant is engaged in the business of manufacturing and of selling concrete pipe principally in the city indicated in the western area.

Name of Company	State of Incorporation	Principal Place of Business
American Pipe and Construction Co. (referred to as American)	California	Monterey Park, California
United Concrete Pipe Corp. (referred to as United)	California	Baldwin Park, California

4. Inasmuch as all defendants are corporations, no defendant is in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States.

5. The acts alleged in this complaint to have been done by each of the defendants were authorized, ordered, or done by the officers, agents, employees, or representatives of each defendant while actively engaged in the management, direction, or control of its affairs.

6. American Concrete Pipe Co. is engaged in the business of manufacturing and of selling concrete pipe in the western area, is a subsidiary of American and is

incorporated in the State of Arizona. It and various other companies not made defendants herein, participated as co-conspirators in the combination and conspiracy hereinafter charged and have performed acts and made statements in furtherance thereof.

7. As used herein, the term:

(a) "Concrete pipe" means pipe constructed of concrete either with or without metal components, to convey water or sewage, and includes both pressure and nonpressure pipe;

(b) "Metal components" refers to steel sheets, skelp, rods, wire and mesh used in the manufacture of concrete pipe;

(c) "Western area" refers to California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho, and Hawaii; and

(d) "End users" means customers who purchase and install or have installed concrete pipe to transport drinking water and for sanitation, drainage, irrigation, flood control and similar purposes.

8. The construction of systems utilizing concrete pipe is often contracted for by the end user with general contractors on the basis of sealed competitive bids. Prior to submitting such bids, the general contractors solicit quotations from pipe manufacturers for the purchase price of the pipe delivered to the site where the pipe is to be installed. Thus the pipe manufacturer knows who the end user will be. The award winning contractor purchases the pipe from the low quoting pipe manufacturer at the price quoted by the latter and passes this price along to the end user. End users also purchase pipe directly from pipe manufacturers usually on the basis of sealed competitive bids.

9. The corporate defendants are the principal manufacturers of concrete pipe in the western area and during the period 1958 through 1961 their average annual sales of concrete pipe in the western area were at least $41,500,000. Because of the relatively limited number of manufacturers of concrete pipe, general contractors and end users frequently solicit bids for said pipe from manufacturers outside the State where said pipe is to be installed. Manufacturers of said pipe usually manufacture the pipe for a particular job only after receiving an order for it. Said manufacturers customarily identify each section of pipe so as to designate its position in the pipe lne and deliver or have delivered said pipe direct to the trench site or as near as possible to the place where it will be installed. During the period of time covered by this complaint, the defendants herein have manufactured substantial quantities of concrete pipe at their plants within the western area, and have sold, shipped, and delivered said pipe to job sites outside the State where it was manufactured. Thus said concrete pipe moves in a continuous and uninterrupted flow from the place of manufacture to points of installation outside the State where said pipe was manufactured.

10. Most concrete pipe, as it is manufactured, is reinforced with metal components both to strengthen the pipe and, particularly with respect to concrete pressure pipe, to make it watertight. The defendant manufacturers purchase said metal compents in anticipation of orders or to enable them to fill existing orders for concrete pipe. Substantial quantities of the metal components are produced outside the State where said pipe is manufactured. The movement in interstate commerce of the metal components is necessary to the manufacture and sale of concrete pipe by the defendants in the west-

ern area and the defendants and co-conspirators are conduits through which said metal components flow in a continuous uninterrupted stream in interstate commerce from the place where said components are produced to the place where the components are incorporated into concrete pipe and on to the final site where said pipe is installed.

11. Any restraint upon free competition in the production or sale of concrete pipe in the western area necessarily and directly restrains and affects the interstate flow of concrete pipe and the metal components used in the construction of said pipe.

12. During the period covered by this complaint, the plaintiff through its various executive departments and agencies has purchased substantial quantities of concrete pipe for use in the construction of systems to convey water and sewage throughout the western area of the United States. Plaintiff purchased some amounts of the said concrete pipe pursuant to direct sealed competitive bidding procedures and in accordance with this practice and for the purpose of letting contracts, it advertised and called for bids from pipe manufacturers, including defendants, seeking to supply concrete pipe to plaintiff. Plaintiff has also purchased some amounts of the said concrete pipe pursuant to direct sealed competitive bidding procedures in accordance with which it advertised and called for bids from general contractors seeking to construct systems to convey water and sewage for plaintiff. Said contractors in turn solicited bids and quotations from the pipe manufacturers, including defendants, for the concrete pipe to be used in the said system. The bids or quotations tendered by the pipe manufacturers to the contractors were incorporated into the sealed bids submitted by the contractors to the

plaintiff. The pipe manufacturers, including defendants and co-conspirators, knew that the bids or quotations which they submitted to the contractor for the concrete pipe would be thus incorporated into the bids submitted by the contractor to the plaintiff, that the price of said concrete pipe represented a substantial portion of the entire bid submitted by the contractor to the plaintiff and that said price would be paid by the plaintiff either directly to the pipe manufacturer or to the contractor who, in turn, would pay said price to the pipe manufacturer.

13. Beginning in or prior to the year 1954 and continuing thereafter until at least August 1962, the exact dates being to the plaintiff unknown, the defendants and the co-conspirators knowingly combined, conspired and agreed to defraud and injure the United States by obtaining or aiding to obtain the payment or allowance of false or fraudulent claims under contracts awarded them for the sale of concrete pipe during said period.

14. The aforesaid combination and conspiracy has consisted, among other things, of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of concrete pipe and to allocate and divide orders for the purchase of concrete pipe among themselves.

15. During the period of time covered by this complaint, the defendants and co-conspirators, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, the following:

(a) In or about 1954 the presidents of American and United, plus a vice president of each de-

fendant, attended several meetings at American's office in South Gate. At these meetings a working agreement which had been in effect for some time between the two companies was reaffirmed. The agreement included the following terms:

(i) that of the total concrete pipe sales made by the two defendants, except for sales in the northwest, approximately 60 per cent would be taken by American and approximately 40 per cent would be taken by United;

(ii) that in the northwest (Washington and Oregon) 55 per cent of the total sales made by the two defendants would be taken by American and 45 per cent would be taken by United;

(iii) that wherever the two defendants encountered competition from other manufacturers of concrete pipe every effort would be made to bring such manufacturers into the conspiracy and allot each a percent of the market based on its historical position within its area of operation;

(iv) that meetings would be held at approximately six month intervals between the presidents of American and United and other representatives of the defendants and co-conspirators to discuss and decide in advance which company would be entitled to submit the lowest bid on each major job known to be scheduled for installation in the near future;

(v) that information would be exchanged regularly between representatives of the defendants and co-conspirators to enable each corporate participant to keep a record of the

amount of business secured by each such participant;

(vi) that before final bids or quotations were submitted on each job of any importance, agreement would be reached by representatives of the defendants and co-conspirators on the dollar amount to be bid by each defendant or co-conspirator;

(vii) that bids would be submitted in such a way as to create the semblance of competitive bidding and pricing.

(b) The terms of this agreement were adhered to by the defendants throughout the period of this complaint, except that in or about 1960 or 1961, the exact date being unknown to the plaintiff, the percentage allocation between American and United was changed from a ratio of 60/40 to a ratio of 58/42 in favor of American in all areas outside of the northwest.

16. Pursuant to said combination and conspiracy, and as a result of the acts done in furtherance thereof, defendants have been awarded contracts for the sale of concrete pipe, and have received payments thereunder, on the basis of bids and quotations which they submitted and which they falsely or fraudulently represented to be bona fide, independent, competitive, and not the product of any collusion or agreement between the bidders, and the prices of which bids they further falsely or fraudulently represented to be normal, reasonable and competitive whereas, in fact known to defendants but unknown to plaintiff, the said bids submitted were sham and collusive and not the result of open competition, and prices therefor were unreasonable, arbitrary, and noncompetitive.

17. With respect to each such contract awarded for the supply of concrete pipe during the aforesaid period of the conspiracy, the defendant to which such contract was awarded, presented and/or caused to be presented to plaintiff for payment or approval by it numerous claims, knowing such claims to be false, fictitious or fraudulent in that such claims were based on a contract which had been falsely or fraudulently procured by reason of the aforesaid bidding practices.

18. As a result of the presentment to it of the aforesaid false or fraudulent claims, and without knowledge thereof, plaintiff has paid the false or fraudulent claims to defendants or to contractors to whom defendants submitted bids.

19. As a result of the illegal combination and conspiracy and the defendants' acts in furtherance thereof, plaintiff has been compelled to pay substantially higher prices for concrete pipe than would have been the case but for the illegal conduct complained of herein, and has been, financially damaged by defendants, the amount of which is presently undetermined.

20. WHEREFORE, the United States of America:

(a) Demands judgment against defendants for Two Thousand Dollars ($2,000.00) for the said conspiracy, for double the amount of the damages it has sustained, and for such other forfeitures as are allowable by law, as provided in Sections 3490, 3491, 3492 and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233) together with interest thereon and the costs of this suit; and

(b) Prays that it recover such other amounts and have such other and further relief as the Court shall deem just.

COUNT II

21. As an alternative to the claim, alleged in Count One, the United States of America, in its aforesaid capacity as purchaser of concrete pipe for use by Federal governmental organizations, brings this suit against the defendants under Section 4A of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731, as amended (15 U.S.C. § 15A), entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, to recover damages which it has sustained due to violations by defendants of Section 1 of the Sherman Act (15 U.S.C. § 1).

22. The allegations contained in paragraphs 2, 3 and 5 through 11 of this complaint are here realleged with the same force and effect as though set forth in full.

23. Beginning in or prior to the year 1954 and continuing thereafter until at least August 1962, the exact dates being to the plaintiff unknown, defendants and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in concrete pipe in the western area, in violation of Section 1 of the Sherman Act.

24. The aforesaid combination and conspiracy has consisted, among other things, of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of concrete pipe and to allocate and divide orders for the purchase of concrete pipe among themselves.

25. During the period of time covered by this complaint, the defendants and co-conspirators, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, those acts which are alleged in paragraph 15 of the complaint which are here realleged with the same force and effect as though set forth in full.

26. The effects of the aforesaid combination and conspiracy were that:

(a) Prices for concrete pipe throughout the western area have been raised, fixed and maintained at high and artificial levels;

(b) Price competition in the sale of concrete pipe throughout the western area has been restrained, suppressed, and eliminated;

(c) Purchasers of concrete pipe throughout the western area have been deprived of the benefits of free competition in the purchase of concrete pipe; and

(d) Public agencies engaged in the construction of systems to convey water and sewage including Federal governmental organizations such as the Bureau of Reclamation and the United States Army Corps of Engineers, have been forced to pay high artificially fixed prices for concrete pipe.

27. Plaintiff had no knowledge of the said combination and conspiracy, or of any facts which might have led to the discovery thereof until August 1960, and it first became fully aware of the scope of the unlawful conspiracy during the course of the grand jury proceedings which culminated in the return of an indictment

in this District against American and United in March 1964. (*United States v. American Pipe and Construction Co., et al.*, Criminal No. 33338.) It could not have uncovered the conspiracy at an earlier date by the exercise of due diligence, inasmuch as the unlawful conspiracy had been fraudulently concealed by defendants.

28. Since at least 1954, plaintiff has purchased substantial quantities of concrete pipe from defendants for use in the western area of the United States. In purchasing said concrete pipe, plaintiff in some instances has invited formal, sealed competitive bids from prospective suppliers, including defendants, and has generally accepted the price offered by the lowest responsible bidder.

29. As a result of the illegal combination and conspiracy alleged herein, plaintiff has been led and induced by defendants to make contract awards on bids solicited by it during the period covered by this complaint at prices fixed by said illegal combination and conspiracy, and plaintiff has been denied thereby the benefit of unrestricted competition in prices for concrete pipe. By the operation of defendants' agreement and concert of action herein alleged, plaintiff has been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

30. Plaintiff has also purchased concrete pipe under construction contracts with independent contractors who had purchased said concrete pipe from defendants at high, non-competitive prices. By the operation of defendants' agreements and concert of action herein alleged, plaintiff has been compelled to pay substantially higher prices under said contracts than would have

been the case but for the violation of the antitrust laws herein alleged.

31. As a result of the illegal combination and conspiracy alleged herein, plaintiff United States of America has been injured and financially damaged by defendants, in an amount which is presently undetermined.

32. WHEREFORE, the United States of America:

(a) Prays that the herein alleged combination and conspiracy among defendants be adjudged and decreed to be in unreasonable restraint of interstate trade and commerce and in violation of Section 1 of the Sherman Act:

(b) Demands judgment against defendants for the damages suffered by it due to defendants' violation of the antitrust laws, as provided for in Section 4A of the Clayton Act (15 U.S.C. § 15A), or some lesser amount to the extent that it has recovery under Count I hereof, together with such interest thereon as is permitted by law and the costs of this suit; and

(c) Prays that it recover such other amounts as the Court shall deem just.

COUNT III

33. As a third claim, the United States of America brings this suit under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (15 U.S.C. § 4), as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Section 1 of the Sherman Act. (15 U.S.C. § 1).

34. The allegations contained in paragraphs 2, 3 and 5 through 11 of the complaint are here realleged with the same force and effect as though set forth in full.

35. Beginning in or prior to the year 1954 and continuing thereafter until at least August 1962, the exact dates being to the plaintiff unknown, defendants and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in concrete pipe in the western area, in violation of Section 1 of the Sherman Act.

36. The aforesaid combination and conspiracy has consisted, among other things, of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of concrete pipe and to allocate and divide orders for the purchase of concrete pipe among themselves.

37. The aforesaid unlawful combination and conspiracy was terminated only after plaintiff began its investigation of the conspiracy herein alleged, and will be resumed unless the relief herein prayed for is granted.

38. During the period of time covered by this complaint, the defendants and co-conspirators, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, those acts which are alleged in paragraph 15 of the complaint which are here realleged with the same force and effect as though set forth in full.

39. The allegations contained in paragraph 26 of the complaint are here realleged with the same force and effect as though set forth in full.

40. WHEREFORE, the plaintiff prays:

(a) That the Court adjudge and decree that the defendants, and each of them, have engaged in an unlawful combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act.

(b) That each of the defendants, its successors, assignees, subsidiaries and transferees, and the respective officers, directors, agents, and employees thereof, and all other persons acting or claiming to act on behalf thereof, be perpetually enjoined and restrained from, in any manner, directly or indirectly:

(i) Continuing, maintaining, or revewing the aforesaid combination and conspiracy and from engaging in any other combination, conspiracy, agreement, understanding, or concert of action having a similar purpose or effect and from adopting or following any practice, plan, program, or device having a similar purpose or effect.

(ii) Entering into any agreement, arrangement, concerted activity, or understanding with any other manufacturer, distributor or seller of pipe for the conveyance of water or sewage or with any company providing the services of lining or coating such pipe or with any association of said manufacturers, distributors or sellers, in relation to said product, products or services, to:

(1) Fix or adopt prices, terms, or conditions of sale;

(2) Maintain or stabilize prices;

(3) Submit noncompetitive, collusive, complimentary, or rigged bids or quotations to any customer;

(4) Allocate or divide orders, territories or customers;

(5) Exchange information concerning bids, prices, terms or conditions of sale;

(6) Exclude or eliminate others from competing;

(iii) With respect to pipe for the conveyance of water or sewage or for the service of lining and/or coating such pipe.

(1) Coercing or inducing others to restrict their production to certain sizes or types of the aforesaid pipe;

(2) Coercing or inducing others to restrict their sales to any territory;

(3) Quoting or bidding any job only on an "all or nothing" basis;

(4) Coercing or inducing contractors to enter agreements to deal with one supplier only before the opening of bids;

(5) Communicating to or exchanging with any manufacturer, distributor or seller of pipe for the conveyance of water or sewage or with any company providing the services of lining or coating such pipe any information concerning bids, prices, terms or conditions of sale.

(c) That the Court order each defendant for a period of five (5) years to certify in writing,

through one of its officers, at the time of every succeeding change in published prices, "estimating prices," terms, or conditions of sale of pipe, for the conveyance of water or sewage, that said change was independently arrived at by said defendant and was not the result of any agreement or understanding with any competitor; and further that each defendant retain in its files the aforesaid certifications which shall be made available to plaintiff for inspection upon reasonable written demand.

(d) That the Court order that each defendant maintain, for a period of five (5) years from the date of entry of final judgment herein, a record of all meetings attended by any of its officers, directors, or employees having managerial or supervisory authority in connection with the sale or pricing of pipe, for the conveyance of water or sewage, and similar representatives of any of its competitors; said records shall include the dates and places of said meetings, the names of all persons in attendance, and a listing of the topics discussed thereat; said records shall be made available to plaintiff for inspection upon reasonable written demand.

(e) That the Court order each defendant to annex to every sealed bid or quotation on pipe for the conveyance of water or sewage a writtten certification by an officer of said defendant, or by the official of said defendant having authority to determine the bid or quotation involved, that said bid or quotation was not the result of any agreement, understanding, or communication between the defendant and any of its competitors.

(f) That plaintiff have such other, further, and different relief as the Court may deem just and proper in the premises.

(g) That plaintiff recover the costs of this suit.

Dated: October 28, 1964

/s/ Nicholas deB. Katzenbach
NICHOLAS deB. KATZENBACH
Acting Attorney General

/s/ William H. Orrick, Jr.
WILLIAM H. ORRICK, JR.
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/s/ Harry G. Sklarsky
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/s/ Thomas R. Sheridan
THOMAS R. SHERIDAN
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/s/ Stanley E. Disney
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/s/ Barbara J. Svedberg
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/s/ Herbert A. Karzen
HERBERT A. KARZEN

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Filed: October 28, 1964.

First Amended Complaint.

(Injunction and Money Damages).

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, vs. Kaiser Steel Corporation and United States Steel Corporation, Defendants. Civil No. 64-833-HW.

The United States of America, plaintiff herein, by its attorneys, brings this action against the defendants named herein in three counts. As a first claim the United States of America in its capacity as purchaser of steel large diameter pressure pipe for use by Federal agencies, brings this suit under the False Claims Act (31 U.S.C. §§ 231-233) for double the amount of damages sustained, plus forfeitures (Count One), and as a second claim, alternatively, under Section 4A of the Clayton Act (15 U.S.C. §15A) to recover its actual damages (Count Two). The plaintiff waives its right of recovery under Counts I and II hereof for any purchase for which it recovers damages under any other complaint concerning related conspiracies, filed by the plaintiff concurrently with the filing of this complaint.

As a third claim, the United States of America brings this suit under Section 4 of the Sherman Act (15 U.S.C. §4), in order to prevent and restrain continuing violation by the defendants, as hereinafter alleged, of Section 1 of said Act (15 U.S.C. § 1) (Count Three).

COUNT I

1. As a first claim, the United States of America in its capacity as purchaser of steel large diameter pressure pipe for use by those Federal governmental organizations engaged in the construction of systems

to convey water and sewage throughout the Western Area of the United States, brings this suit under §§ 3490, 3491, 3492 and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233), commonly known as the False Claims Act.

2. Each of the defendants maintains an office, transacts business and is found within the Southern District of California.

3. Each of the corporations listed below is made a defendant herein. Each of said corporations is organized and exists under the laws of the State indicated. Each defendant is engaged in the business of manufacturing and of selling steel large diameter pressure pipe principally at the place indicated in the western area.

Name of Company	State of Incorporation	Principal Place of Business
Kaiser Steel Corporation (referred to herein as Kaiser)	Nevada	Oakland, California
United States Steel Corporation (referred to herein as U.S. Steel)	New Jersey	Commerce, California

4. Inasmuch as all defendants are corporations, no defendant is in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States.

5. The acts alleged in this complaint to have been done by each of the defendants were authorized, ordered, or done by the officers, agents, employees, or representatives of each defendant while actively engaged in the management, direction, or control of its affairs.

6. Southwest Welding and Manufacturing Company (referred to herein as Southwest Welding) and certain officers and employees of Southwest Welding and of

the corporate defendants participated as co-conspirators in the combination and conspiracy hereinafter charged and have performed acts and made statements in furtherance thereof.

7. As used herein, the term:

(a) "Steel large diameter pressure pipe," referred to herein as steel LDP pipe, means heavy walled welded steel pipe which is manufactured in diameters of over 24 inches and sold for the conveyance of water or sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch;

(b) "Western area" refers to California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii; and

(c) "End users" means customers who purchase and install or have installed steal LDP pipe in systems primarily for the conveyance of water or sewage under pressure.

8. Steel LDP pipe is used for the conveyance of drinking water under pressure and for irrigation and sanitation systems. The construction of systems utilizing steel LDP pipe is often contracted for by the end user with general contractors on the basis of sealed competitive bids. Prior to submitting such bids, the general contractors solicit quotations from pipe manufacturers for the purchase price of the pipe delivered to the site where the pipe is to be installed. Thus the pipe manufacturer knows who the end user will be. The award-winning contractor purchases the pipe from the low quoting pipe manufacturer at the price quoted by the latter and passes this price along to the end user. End users also purchase pipe directly from pipe manu-

facturers, usually on the basis of sealed competitive bids.

9. The corporate defendants are the principal manufacturers of steel LDP pipe in the western area, and during the period 1958 through 1961 their average annual sales of steel LDP pipe in the western area were at least $7,000,000. Because of the relatively limited number of manufacturers of steel LDP pipe, general contractors and end users frequently solicit bids for said pipe from manufacturers outside the State where said pipe is to be installed. Manufacturers of said pipe usually manufacture the pipe for a particular job only after receiving an order for it. Said manufacturers customarily identify each section of pipe so as to designate its position in the pipe line and deliver or have delivered said pipe directly to the trench site or as near as possible to the place were it will be installed. During the period of time covered by this complaint, the defendants herein have manufactured substantial quantities of steel LDP pipe at their plants within the Western area, and have sold, shipped, and delivered said pipe to job sites outside the State where it was manufactured. Thus said steel LDP pipe moves in a continuous and uninterrupted flow from the place of manufacture to points of installation outside the State where said pipe was manufactured.

10. Steel LDP pipe is fabricated largely from steel plate. The defendant manufacturers obtain said steel plate in anticipation of orders or to enable them to fill existing orders for steel LDP pipe. Substantial quantities of said steel plate are produced outside the State where said pipe is manufactured. The movement in interstate commerce of the steel plate is necessary to the manufacture and sale of steel LDP pipe by the defendants

in the western area, and the defendants and co-conspirators are conduits through which said steel plate flows in a continuous uninterrupted stream in interstate commerce from the place where said steel plate is produced to the place where it is incorporated into steel LDP pipe and on to the final site where said pipe is installed.

11. Any restraint upon free competition in the production or sale of steel LDP pipe in the western area necessarily and directly restrains and affects the interstate flow of steel LDP pipe and the steel plate used in the construction of said pipe.

12. During the period covered by this complaint, the plaintiff through its various executive departments and agencies has purchased substantial quantities of steel LDP pipe for use in the construction of systems to convey water and sewage throughout the western area of the United States, Plaintiff purchased some amounts of the said steel LDP pipe pursuant to direct sealed competitive bidding procedures and in accordance with this practice and for the purpose of letting contracts, it advertised and called for bids from pipe manufacturers, including defendants, seeking to supply steel LDP pipe to plaintiff. Plaintiff has also purchased some amounts of the said steel LDP pipe pursuant to direct sealed competitive bidding procedures in accordance with which it advertised and called for bids from general contractors seeking to construct systems to convey water and sewage for plaintiff. Said contractors in turn solicited bids and quotations from the pipe manufacturers, including defendants, for the steel LDP pipe to be used in the said system. The bids or quotations tendered by the pipe manufacturers to the contractors were incorporated into the sealed bids

submitted by the contractors to the plaintiff. The pipe manufacturers, including defendants, knew that the bids or quotations which they submitted to the contractor for the steel LDP pipe would be thus incorporated into the bids submitted by the contractor to the plaintiff, that the price of said steel LDP pipe represented a substantial portion of the entire bid submitted by the contractor to the plaintiff and that said price would be paid by the plaintiff, either directly to the pipe manufacturer or to the contractor who in turn would pay said price to the pipe manufacturer.

13. Beginning sometime prior to the year 1955 and continuing thereafter until at least August 1962, the exact dates being to the plaintiff unknown, the defendants and the co-conspirators knowingly combined, conspired and agreed to defraud and injure the United States by obtaining or aiding to obtain the payment or allowance of false or fraudulent claims under contracts awarded them for the sale of steel LDP pipe during said period.

14. The aforesaid combination and conspiracy has consisted, among other things, of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of steel LDP pipe and to allocate and divide orders for the purchase of steel LDP pipe among themselves.

15. During the period of time covered by this complaint, the defendants and the co-conspirators, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, the following:

(a) In 1955 several meetings were held at the Statler Hilton and Sheraton-West hotels in Los

Angeles attended by P. M. Cobb and James Greer Thompson of U.S. Steel; Ernest L. Ilsley and Homer Barnes of Kaiser; and Monte Lindmoe of Southwest Welding. At these meetings an agreement was reached which included the following terms:

(i) Sales of steel LDP pipe would be divided so that U.S. Steel would obtain 38 per cent, Kaiser 35 per cent, and Southwest Welding 27 per cent of the total of such sales;

(ii) Meetings would be held periodically between representatives of the three companies in Los Angeles and San Francisco to discuss and decide in advance which company would be entitled to submit the lowest bid on each major job known to be scheduled for installation in the near future;

(iii) Information would be exchanged regularly between representatives of the three companies to enable each participant to keep a record of the amount of business secured by each such participant. Tallies were kept by Herb Thoedy in San Francisco and Norman David Lindley in Los Angeles for U.S. Steel;

(iv) Before final bids or quotations were submitted on each job of any importance, agreement would be reached by representatives of the participants on the dollar amount to be bid by each participant;

(v) Bids would be submitted in such a way as to create the semblance of competitive bidding and pricing.

(b) The terms of this agreement were adhered to by the defendants throughout the period of this complaint, except that in 1961 Southwest Welding was dissolved and U.S. Steel and Kaiser reallocated the business between themselves;

(c) Many phone calls were made between Monte Parker Lindmoe of Southwest Welding; James Greer Thompson, Norman David Lindley, and P. M. Cobb of U.S. Steel; and Homer A. Barnes and Ernest L. Ilsley of Kaiser to reach agreement on dollar amounts to be bid on future jobs.

16. Pursuant to said combination and conspiracy, and as a result of the acts done in furtherance thereof, defendants have been awarded contracts for the sale of steel LDP pipe, and have received payments thereunder, on the basis of bids and quotations which they submitted and which they falsely or fraudulently represented to be bona fide, independent, competitive, and not the product of any collusion or agreement between the bidders, and the prices of which bids they further falsely or fraudulently represented to be normal, reasonable and competitive whereas, in fact known to defendants but unknown to plaintiff, the said bids submitted were sham and collusive and not the result of open competition, and prices therefor were unreasonable, arbitrary, and non-competitive.

17. With respect to each such contract awarded for the supply of steel LDP pipe during the aforesaid period of the conspiracy, the defendant to which such contract was awarded presented and/or caused to be presented to plaintiff for payment or approval by it numerous claims, knowing such claims to be false, fic-

titious, or fraudulent in that such claims were based on a contract which had been falsely or fraudulently procured by reason of the aforesaid bidding practices.

18. As a result of the presentment to it of the aforesaid false or fraudulent claims, and without knowledge thereof, plaintiff has paid the false or fraudulent claims to defendants or contractors to whom defendants submitted bids.

19. As a result of the illegal combination and conspiracy and the defendants' acts in furtherance thereof, plaintiff has been compelled to pay substantially higher prices for steel LDP pipe than would have been the case but for the illegal conduct complained of herein, and has been financially damaged by defendants, the amount of which is presently undetermined.

20. WHEREFORE, the United States of America:

(a) Demands judgment against defendants for Two Thousand Dollars ($2,000) for the said conspiracy, for double the amount of the damages it has sustained, and for such other forfeitures as are allowable by law, as provided in Sections 3490, 3491, 3492 and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233) together with interest thereon and the costs of this suit; and

(b) Prays that it recover such other amounts and have such other and further relief as the Court shall deem just.

COUNT II

21. As an alternative to the claim alleged in Count One, the United States of America, in its aforesaid capacity as purchaser of steel LDP pipe for use by Federal governmental organizations, brings this suit

against the defendants under Section 4A of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731, as amended (15 U.S.C. § 15A), entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, to recover damages which it has sustained due to violations by defendants of Section 1 of the Sherman Act (15 U.S.C. § 1).

22. The allegations contained in paragraphs 2, 3, and 5 through 11 of this complaint are here realleged with the same force and effect as though set forth in full.

23. Beginning prior to the year 1955 and continuing thereafter until at least August 1962, the exact dates being to the plaintiff unknown, defendants and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of aforesaid interstate trade and commerce in steel LDP pipe in the western area in violation of Section 1 of the Sherman Act.

24. The aforesaid combination and conspiracy has consisted, among other things, of a continuing agreement, understanding, and concert of action among the defendants and co-conpirators to submit collusive and rigged bids for the sale of steel LDP pipe and to allocate and divide orders for the purchase of steel LDP pipe among themselves.

25. During the period of time covered by this complaint, the defendants and co-conspirators for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, those acts which are alleged in paragraph 15 of the complaint which are here re-

alleged with the same force and effect as though set forth in full.

26. The effects of the aforesaid combination and conspiracy were that:

(a) Prices for steel LDP pipe throughout the western area have been raised, fixed and maintained at high and artificial levels;

(b) Price competition in the sale of steel LDP pipe throughout the western area has been restrained, suppressed, and eliminated;

(c) Purchasers of steel LDP pipe throughout the western area have been deprived of the benefits of free competition in the purchase of steel LDP pipe; and

(d) Public agencies engaged in the construction of systems to convey water and sewage including Federal governmental organizations such as the Bureau of Reclamation and the Unted States Army Corps of Engineers, have been forced to pay high artificially fixed prices for steel LDP pipe.

27. Plaintiff had no knowledge of the said combination and conspiracy, or of any facts which might have led to the discovery thereof until August 1960, and it first became fully aware of the scope of the unlawful conspiracy during the course of the grand jury proceedings which culminated in the return of an indictment in this District against Kaiser and United States Steel in March 1964. (*United States v. Kaiser Steel Corporation et al.*, Criminal No. 33339). It could not have uncovered the conspiracy at an earlier date by the exercise of due diligence, inasmuch as the unlawful conspiracy had been fraudulently concealed by defendants.

28. Since at least 1955, plaintiff has purchased substantial quantities of steel LDP pipe from defendants for use in the western area of the United States. In purchasing said steel LDP pipe, plaintiff in some instances has invited formal, sealed competitive bids from prospective suppliers, including defendants, and has generally accepted the price offered by the lowest responsible bidder.

29. As a result of the illegal combination and conspiracy alleged herein, plaintiff has been led and induced by defendants to make contract awards on bids solicited by it during the period covered by this complaint at prices fixed by said illegal combination and conspiracy, and plaintiff has been denied thereby the benefit of unrestricted competition in prices for steel LDP pipe. By the operation of defendants' agreement and concert of action herein alleged, plaintiff has been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

30. Plaintiff has also purchased steel LDP pipe under construction contracts with independent contractors who had purchased said steel LDP pipe from defendants at high, noncompetitive prices. By the operation of defendants' agreements and concert of action herein alleged, plaintiff has been compelled to pay substantially higher prices under said contracts than would have been the case but for the violation of the antitrust laws herein alleged.

31. As a result of the illegal combination and conspiracy alleged herein, the plaintiff, United States of America, has been injured and financially damaged by defendants in an amount which is presently undetermined.

32. WHEREFORE, the United States of America:

(a) Prays that the herein alleged combination and conspiracy among defendants be adjudged and decreed to be in unreasonable restraint of interstate trade and commerce and in violation of Section 1 of the Sherman Act;

(b) Demands judgment against defendants for the damages suffered by it due to defendants' violation of the antitrust laws, as provided for in Section 4A of the Clayton Act (15 U.S.C. § 15A), or some lesser amount to the extent that it has recovery under Count I hereof, together with such interest thereon as is permitted by law and the costs of this suit; and

(c) Prays that it recover such other amounts as the Court shall deem just.

COUNT III

33. As a third claim, the United States of America brings this suit under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (15 U.S.C. § 4), as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", commonly known at the Sherman Act, in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Section 1 of the Sherman Act (15 U.S.C. § 1).

34. The allegations contained in paragraphs 2, 3 and 5 through 11 of the complaint are here realleged with the same force and effect as though set forth in full.

35. Beginning in or prior to the year 1955 and continuing thereafter until at least January 1962, the exact dates being to the plaintiff unknown, defendants and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in steel LDP pipe in the western area, in violation of Section 1 of the Sherman Act.

36. The aforesaid combination and conspiracy has consisted, among other things, of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of steel LDP pipe and to allocate and divide orders for the purchase of steel LDP pipe among themselves.

37. The aforesaid unlawful combination and conspiracy was terminated only after plaintiff began its investigation of the conspiracy herein alleged, and will be resumed unless the relief herein prayed for is granted.

38. During the period of time covered by this complaint the defendants and co-conspirators, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, those acts which are alleged in paragraph 15 of the complaint which are here realleged with the same force and effect as though set forth in full.

39. The allegations contained in paragraph 26 of the complaint are here realleged with the same force and effect as though set forth in full.

40. WHEREFORE, plaintiff prays:

(a) That the Court adjudge and decree that the defendants, and each of them, have engaged in an unlawful combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act.

(b) That each of the defendants, its successors, assignees, subsidiaries and transferees, and the respective officers, directors, agents, and employees thereof, and all other perons acting or claiming to act on behalf thereof, be perpetually enjoined and restrained from, in any manner, directly or indirectly:

(i) Continuing, maintaining, or renewing the aforesaid combination and conspiracy and from engaging in any other combination, conspiracy, agreement, understanding, or concert of action having a similar purpose or effect and from adopting or following any practice, plan, program, or device having a similar purpose or effect.

(ii) Entering into an agreement, arrangement, concerted activity, or understanding with any other manufacturer, distributor or seller of pipe for the conveyance of water or sewage or with any company providing the services of lining or coating such pipe or with any association of said manufacturers, distributors, or sellers, in relation to said product, products or services, to:

(1) Fix or adopt prices, terms, or conditions of sale;

(2) Maintain or stabilize prices;

(3) Submit noncompetitive, collusive, complimentary, or rigged bids or quotations to any customer;

(4) Allocate or divide orders, territories or customers;

(5) Exchange information concerning bids, prices, terms or conditions of sale;

(6) Exclude or eliminate others from competing;

(iii) With respect to pipe for the conveyance of water or sewage or for the service of lining and/or coating such pipe:

(1) Coercing or inducing others to restrict their production to certain sizes or types of the aforesaid pipe;

(2) Coercing or inducing others to restrict their sales to any territory;

(3) Quoting or bidding any job only on an "all or nothing" basis;

(4) Cocercing or inducing contractors to enter agreements to deal with one supplier only before the opening of bids;

(5) Communicating to or exchanging with any manufacturer, distributor or seller of pipe for the conveyance of water or sewage or with any company providing the services of lining or coating such pipe any information concerning bids, prices, terms or conditions of sale;

(c) That the Court order each defendant for a period of five (5) years to certify in writing,

through one of its officers, at the time of every succeeding change in published prices, "estimating prices," terms, or conditions of sale of pipe, for the conveyance of water or sewage, that said change was independently arrived at by said defendant and was not the result of any agreement or understanding with any competitor; and further that each defendant retain in its files the aforesaid certifications which shall be made available to plaintiff for inspection upon reasonable written demand.

(d) That the Court order that each defendant maintain, for a period of five (5) years from the date of entry of final judgment herein, a record of all meetings attended by any of its officers, directors, or employees having managerial or supervisory authority in connection with the sale or pricing of pipe, for the conveyance of water or sewage, and similar representatives of any of its competitors; said records shall include the dates and places of said meetings, the names of all persons in attendance, and a listing of the topics discussed thereat; said records shall be made available to plaintiff for inspection upon reasonable written demand.

(e) That the Court order each defendant to annex to every sealed bid or quotation on pipe for the conveyance of water or sewage a written certification by an officer of said defendants, or by the official of said defendant having authority to determine the bid or quotation involved, that said bid or quotation was not the result of any agreement, understanding, or communication between the defendant and any of its competitors.

(f) That plaintiff have such other, further, and different relief as the Court may deem just and proper in the premises.

(g) That plaintiff recover the costs of this suit.

Dated: October 28, 1964.

/s/ Nicholas deB. Katzenbach
NICHOLAS deB. KATZENBACH
Acting Attorney General

/s/ William H. Orrick, Jr.
WILLIAM H. ORRICK, JR.
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/s/ Harry G. Sklarsky
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/s/ Thomas R. Sheridan
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/s/ Barbara J. Svedberg
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Filed October 28, 1964.

First Amended Complaint.

(Injunction and Money Damages).

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, vs. United Concrete Pipe Corp.; American Pipe and Construction Co.; Kaiser Steel Corporation; and United States Steel Corporation, Defendants. Civil No. 64-834-HW.

The United States of America, plaintiff herein, by its attorneys, brings this action against the defendants named herein in three counts. As a first claim the United States of America in its capacity as purchaser of alternate large diameter pressure pipe for use by Federal agencies, brings this suit under the False Claims Act (31 U.S.C. §§ 231-233) for double the amount of damages sustained, plus forefeitures (Count One), and as a second claim, alternatively, under Section 4A of the Clayton Act (15 U.S.C. § 15A) to recover its actual damages (Count Two). The plaintiff waives its right of recovery under Counts I and II hereof for any purchase for which it recovers damages under any other complaint concerning related conspiracies, filed by the plaintiff concurrently with the filing of this complaint.

As a third claim, the United States of America brings this suit under Section 4 of the Sherman Act (15 U.S.C. § 4), in order to prevent and restrain continuing violation by the defendants, as hereinafter alleged, of Section 1 of said Act (15 U.S.C. § 1) (Count Three).

COUNT I

1. As a first claim, the United States of America in its capacity as purchaser of alternate large diameter

pressure pipe for use by those Federal governmental organizations engaged in the construction of systems to convey water and sewage throughout the western area of the United States, brings this suit under 3490, 3491, 3492 and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233, commonly known as the False Claims Act.

2. Each of the defendants maintains an office, transacts business and is found within the Southern District of California.

3. Each of the corporations listed below is made a defendant herein. Each of said corporations is organized and exists under the laws of the State indicated. Each defendant is engaged in the business of manufacturing and of selling alternate large diameter pressure pipe principally in the city indicated in the western area.

Name of Company	State of Incorporation	Principal Place of Business
United Concrete Pipe Co. (referred to herein as United)	California	Baldwin Park, California
American Pipe and Construction Co. (referred to herein as American)	California	Monterey Park, California
Kaiser Steel Corporation (referred to herein as Kaiser)	Nevada	Oakland, California
United States Steel Corporation (referred to herein as U.S. Steel)	New Jersey	Commerce, California

4. Inasmuch as all defendants are corporations, no defendant is in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States.

5. The acts alleged in this complaint to have been done by each of the defendants were authorized, ordered, or done by the officers, agents, employees, or representatives of each defendant while actively engaged in the management, direction, or control of its affairs.

6. Southwest Welding and Manufacturing Company (referred to herein as Southwest Welding), American Concrete Pipe Co. of Phoenix, Arizona, (referred to herein as American Concrete), Pipe Linings, Inc. and certain officers and employees of said corporations and of the corporate defendants participated as co-conspirators in the combination and conspiracy hereinafter charged and have performed acts and made statements in furtherance thereof.

7. As used herein, the term:

(a) "Steel large diameter pressure pipe," or steel LDP pipe means heavy walled welded steel pipe which is manufactured in diameters of over 24 inches and sold for the conveyance of water or sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch;

(b) "Concrete large diameter pressure pipe," or concrete LDP pipe means concrete pressure pipe, which ordinarily utilizes steel sheets or skelp in its manufacture, in diameters over 24 inches, sold for the conveyance of water and sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch;

(c) "Alternate large diameter pressure pipe" or "alternate LDP pipe" means pipe which is manufactured and sold, or offered for sale in jobs where the specifications permit the use of either concrete LDP pipe or steel LDP pipe;

(d) "Metal components" refers to steel plate, sheets, skelp, rods, wires and mesh used in the production of alternate LDP pipe;

(e) "Western area" refers to California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii; and

(f) "End users" means customers who purchase and install or have installed alternate LDP pipe in systems primarily for the conveyance of water or sewage under pressure.

8. Alternate LDP pipe is used for the conveyance of drinking water under pressure and for irrigation and sanitation systems. The construction of systems utilizing alternate LDP pipe is often contracted for by the end user with general contractors on the basis of sealed competitive bids. The end users draft or have drafted the specifications where this is appropriate, so that either concrete LDP pipe or steel LDP pipe can be used in the system. Prior to submitting bids to the end user, the general contractors solicit quotations from pipe manufacturers for the purchase price of the pipe delivered to the site where the pipe is to be installed. Thus the pipe manufacturer knows who the end user will be. The award-winning contractor purchases the pipe from the low quoting pipe manufacturer at the price quoted by the latter and passes this price along to the end user. End users also purchase pipe directly from pipe manufacturers usually on the basis of sealed competitive bids. The specifications for alternate LDP pipe require that the pipe be lined and/or coated with concrete. When the steel LDP pipe manufacturers plan to submit bids or quotations on an alternate LDP pipe job, they, in turn, solicit quotations or bids from the

concrete LDP pipe manufacturers for the performance of this service. The cost of this service is then incorporated in the quotation or bid submitted to the general contractors or end users by the steel LDP pipe manufacturer.

9. The corporate defendants are the principal manufacturers of alternate LDP pipe in the western area and during the period 1958 through 1961 their average annual sales of alternate LDP pipe in the western area were at least $15,000,000. Because of the relatively limited number of manufacturers of alternate LDP pipe, general contractors and end users, where the specifications permit the use of alternate LDP pipe, frequently solicit bids for said pipe from manufacturers outside the State where said pipe is to be installed. Manufacturers of said pipe usually manufacture the pipe for a particular job only after receiving an order for it. Said manufacturers customarily identify each section of pipe so as to designate its position in the pipe line and deliver or have delivered said pipe direct to the trench site or as near as possible to the place where it will be installed. During the period of time covered by this complaint, the defendants herein have manufactured substantial quantities of alternate LDP pipe at their plants within the western area, and have sold, shipped, and delivered said pipe to job sites outside the State where it was manufactured. Thus said alternate LDP pipe moves in a continuous and uninterrupted flow from the place of manufacture to points of installation outside the State where said pipe was manufactured.

10. Substantial quantities of metal components are used in the manufacture of alternate LDP pipe. The defendant manufacturers often obtain said metal com-

ponents in anticipation of orders or to enable them to fill existing orders for alternate LDP pipe. Substantial quantities of the said metal components are produced outside the State where said pipe is manufactured. The movement in interstate commerce of the metal components is necessary to the manufacture and sale of alternate LDP pipe by the defendants in the western area and the defendants and co-conspirators are conduits through which said metal components flow in a continuous, uninterrupted stream in interstate commerce from the place where produced to the place where it is incorporated into alternate LDP pipe and on the final site where said pipe is installed.

11. Any restraint upon free competition in the production or sale of alternate LDP pipe in the western area necessarily and directly restrains and affects the interstate flow of alternate LDP pipe and the metal components used in the manufacture of said pipe.

12. During the period covered by this complaint, the plaintiff through its various executive departments and agencies has purchased substantial quantities of alternate LDP pipe for use in the construction of systems to convey water and sewage throughout the western area of the United States. Plaintiff purchased some amounts of the said alternate LDP pipe pursuant to direct sealed competitive bidding procedures and in accordance with this practice and for the purpose of letting contracts, it advertised and called for bids from pipe manufacturers, including defendants, seeking to supply alternate LDP pipe to plaintiff. Plaintiff has also purchased some amounts of the said alternate LDP pipe pursuant to direct sealed competitive bidding procedures in accordance with which it advertised and called for bids from general contractors seeking

to construct systems to convey water and sewage for plaintiff. Said contractors in turn solicited bids and quotations from the pipe manufacturers, including defendants, for the alternate LDP pipe to be used in the said system. The bids or quotations tendered by the pipe manufacturers to the contractors were incorporated into the sealed bids submitted by the contractors to the plaintiff. The pipe manufacturers, including defendants, knew that the bids or quotations which they submitted to the contractor for the alternate LDP pipe would be thus incorporated into the bids submitted by the contractor to the plaintiff, that the price of said alternate LDP pipe represented a substantial portion of the entire bid submitted by the contractor to the plaintiff and that said price would be paid by the plaintiff, either directly to the pipe manufacturer or to the contractor who, in turn, would pay said price to the pipe manufacturer.

13. Beginning sometime prior to the year 1955 and continuing thereafter until at least August 1962, the exact dates being to the plaintiff unknown, the defendants and the co-conspirators knowingly combined, conspired and agreed to defraud and injure the United States by obtaining or aiding to obtain the payment or allowance of false or fraudulent claims under contracts awarded them for the sale of alternate LDP pipe during said period.

14. The aforesaid combination and conspiracy has consisted, among other things, of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of alternate LPD pipe and to allocate and divide orders for the purchase of alternate LDP pipe among themselves.

15. During the period of time covered by this complaint, the defendants and the co-conspirators, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, the following:

(a) In or about 1955, meetings were held between P. M. Cobb and James Greer Thompson of U.S. Steel; Ernest L. Ilsley and Homer Barnes of Kaiser; Monte Lindmoe of Southwest Welding; Lloyd R. Earl and Richard I. Young of United; and Robert V. Edwards and Elliott E. Brainard of American. At these meetings an agreement was reached or reaffirmed which included the following terms:

(i) that sales of alternate LDP pipe would be divided so that 50 per cent of such sales would be obtained by the manufacturers of concrete LDP pipe and 50 per cent would be obtained by the manufacturers of steel LDP pipe and that the amount of business involved in the lining and coating of the alternate LDP pipe by the concrete LDP pipe manufacturers would be included in the share to be obtained by the concrete LDP pipe manufacturers;

(ii) that the steel LDP pipe manufacturers would not install their own lining and coating facilities but would rely on the concrete LDP pipe manufacturers for this service;

(iii) that meetings would be held periodically between representatives of the steel LDP pipe manufacturers group and concrete LDP pipe manufacturers group in Los Angeles and San Francisco to discuss and decide in advance

which group would be entitled to submit the lowest bid on each major job known to be scheduled for installation in the near future;

(iv) that information would be exchanged regularly between representatives of the concrete LPD pipe manufacturers and the steel LDP pipe manufacturers to enable each group to keep a record of the amount of business secured by each;

(v) that bids would be submitted in such a way as to create the semblance of competitive bidding and pricing.

(b) Many phone calls were made between James Greer Thompson, negotiator for the steel LDP pipe manufacturers and Elliott E. Brainard, negotiator for the concrete LDP pipe manufacturers to reach agreement on which group would submit the lowest bid on each job.

16. Pursuant to said combination and conspiracy, and as a result of the acts done in furtherance thereof, defendants have been awarded contracts for the sale of alternate LDP pipe, and have received payments thereunder, on the basis of bids and quotations which they submitted and which they falsely or fraudulently represented to be bona fide, independent, competitive, and not the product of any collusion or agreement between the bidders, and the prices of which bids they further falsely or fraudulently represented to be normal, reasonable and competitive whereas, in fact known to defendants but unknown to plaintiff, the said bids submitted were sham and collusive and not the result of open competition, and prices therefor were unreasonable, arbitrary, and noncompetitive.

17. With respect to each such contract awarded for the supply of alternate LDP pipe during the aforesaid period of the conspiracy, the defendant to which such contract was awarded, presented and/or caused to be presented to plaintiff for payment or approval by it numerous claims, knowing such claims to be false, fictitious, or fraudulent in that such claims were based on a contract which has been falsely or fraudulently procured by reason of the aforesaid bidding practices.

18. As a result of the presentment to it of the aforesaid false or fraudulent claims, and without knowledge thereof, plaintiff has paid the false or fraudulent claims to defendants or to contractors to whom defendants submitted bids.

19. As a result of the illegal combination and conspiracy and the defendants' acts in furtherance thereof, plaintiff has been compelled to pay substantially higher prices for alternate LDP pipe than would have been the case but for the illegal conduct complained of herein, and has been financially damaged by defendants, the amount of which is presently undetermined.

20. WHEREFORE, the United States of America:

(a) Demands judgment against defendants for Two Thousand Dollars ($2,000.00) for the said conspiracy, for double the amount of the damages it has sustained, and for such other forfeitures as are allowable by law, as provided in Sections 3490, 3491, 3492 and 5438 of the Revised Statutes (31 U.S. §§ 231-233) together with interest thereon and the costs of this suit; and

(b) Prays that it recover such other amounts and have such other and further relief as the Court shall deem just.

COUNT II

21. As an alternative to the claim, alleged in Count One, the United States of America, in its aforesaid capacity as purchaser of alternate LDP pipe for use by Federal governmental organizations, brings this suit against the defendants under Section 4A of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731, as amended (15 U.S.C. § 15A), entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", commonly known as the Clayton Act, to recover damages which it has sustained due to violations by defendants of Section 1 of the Sherman Act (15 U.S.C. § 1).

22. The allegations contained in paragraphs 2, 3, and 5 through 11 of this complaint are here realleged with the same force and effect as though set forth in full.

23. Beginning prior to the year 1955 and continuing thereafter until at least August 1962, the exact dates being to the plaintiff unknown, defendants, and co-conspirators, have engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in alternate LDP pipe in the western area, in violation of Section 1 of the Sherman Act (15 U.S.C. § 1).

24. The aforesaid combination and conspiracy has consisted, among other things, of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of alternate LDP pipe and to allocate and divide orders for the purchase of alternate LDP pipe among themselves.

25. During the period of time covered by this complaint, the defendants and co-conspirators, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, those acts which are alleged in paragraph 16 of the complaint which are here realleged with the same force and effect as though set forth in full.

26. The effects of the aforesaid combination and conspiracy were that:

(a) Prices for alternate LDP pipe throughout the western area have been raised, fixed, and maintained at high and artificial levels;

(b) Price competition in the sale of alternate LDP pipe throughout the western area has been restrained, suppressed, and eliminated;

(c) Purchasers of alternate LDP pipe throughout the western area have been deprived of the benefits of free competition in the purchase of alternate LDP pipe; and

(d) Public agencies engaged in the construction of systems to convey water and sewage, including Federal governmental organizations such as the Bureau of Reclamation and the United States Army Corps of Engineers, have been forced to pay high artificially fixed prices for alternate LDP pipe.

27. Plaintiff had no knowledge of the said combination and conspiracy, or of any facts which might have led to the discovery thereof until August 1960, and it first became fully aware of the scope of the unlawful conspiracy during the course of the grand jury proceedings which culminated in the return of an indictment in this District against American, United, Kaiser, and U.S.

Steel in March 1964. (*United States v. United Concrete Pipe Corp.*, Criminal No. 33340). It could not have uncovered the conspiracy at an earlier date by the exercise of due diligence, inasmuch as the unlawful conspiracy had been fraudulently concealed by defendants.

28. Since at least 1955, plaintiff has purchased substantial quantities of alternate LDP pipe from defendants for use in the western area of the United States. In purchasing said alternate LDP pipe, plaintiff in some instances has invited formal, sealed competitive bids from prospective suppliers, including defendants, and has generally accepted the price offered by the lowest responsible bidder.

29. As a result of the illegal combination and conspiracy alleged herein, plaintiff has been led and induced by defendants to make contract awards on bids solicited by it during the period covered by this complaint at prices fixed by said illegal combination and conspiracy, and plaintiff has been denied thereby the benefit of unrestricted competition in prices for alternate LDP pipe. By the operation of defendants' agreement and concert of action herein alleged, plaintiff has been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

30. Plaintiff has also purchased alternate LDP pipe under construction contracts with independent contractors who had purchased said alternate LDP pipe from defendants at high, noncompetitive prices. By the operation of defendants' agreement and concert of action herein alleged, plaintiff has been compelled to pay substantially higher prices under said contracts than would have been the case but for the violations of the antitrust laws herein alleged.

31. As a result of the illegal combination and conspiracy alleged herein, plaintiff, United States of America, has been injured and financially damaged by defendants in an amount which is presently undetermined.

32. WHEREFORE, the United States of America:

(a) Prays that the herein alleged combination and conspiracy among defendants be adjudged and decreed to be in unreasonable restraint of interstate trade and commerce and in violation of Section 1 of the Sherman Act.

(b) Demands judgment against defendants for the damages suffered by it due to defendants' violation of the antitrust laws, as provided for in Section 4A of the Clayton Act (15 U.S.C. §15A), or some lesser amount to the extent that it has recovery under Count I hereof, together with such interest thereon as is permitted by law and the costs of this suit; and

(c) Prays that it recover such other amounts as the Court shall deem just.

COUNT III

33. As a third claim, the United States of America brings this suit under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (15 U.S.C. § 4), as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Section 1 of the Sherman Act (15 U.S.C. § 1).

34. The allegations contained in paragraphs 2, 3 and 5 through 11 of the complaint are here realleged

with the same force and effect as though set forth in full.

35. Beginning in or prior to the year 1955 and continuing thereafter until at least January 1962, the exact dates being to the plaintiff unknown, defendants and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in alternate LDP pipe in the western area, in violation of Section 1 of the Sherman Act.

36. The aforesaid combination and conspiracy has consisted, among other things, of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of alternate LDP pipe and to allocate and divide orders for the purchase of alternate LDP pipe among themselves.

37. The aforesaid unlawful combination and conspiracy was terminated only after plaintiff began its investigation of the conspiracy herein alleged, and will be resumed unless the relief herein prayed for is granted.

38. During the period of time covered by this complaint, the defendants and co-conspirators, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, those acts which are alleged in paragraph 15 of the complaint which are here realleged with the same force and effect as though set forth in full.

39. The allegations contained in paragraph 26 of the complaint are here realleged with the same force and effect as though set forth in full.

40. WHEREFORE, plaintiff prays:

(a) That the Court adjudge and decree that the defendants, and each of them, have engaged in an unlawful combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act.

(b) That each of the defendants, its successors, assignees, subsidiaries and transferees, and the respective officers, directors, agents, and employees thereof, and all other persons acting or claiming to act on behalf thereof, be perpetually enjoined and restrained from, in any manner, directly or indirectly:

(i) Continuing, maintaining, or renewing the aforesaid combination and conspiracy and from engaging in any other combination, conspiracy, agreement, understanding, or concert of action having a similar purpose or effect and from adopting or following any practice, plan, program, or device having a similar purpose or effect.

(ii) Entering into any agreement, arrangement, concerted activity, or understanding with any other manufacturer, distributor or seller of pipe for the conveyance of water or sewage or with any company providing the services of lining or coating such pipe or with any association of said manufacturers, distributors, or sellers, in relation to said product, products or services, to:

(1) Fix or adopt prices, terms, or conditions of sale;

(2) Maintain or stabilize prices;

(3) Submit noncompetitive, collusive, complimentary, or rigged bids or quotations to any customer;

(4) Allocate or divide orders, territories or customers;

(5) Exchange information concerning bids, prices, terms or conditions of sale;

(6) Exclude or eliminate others from competing.

(iii) With respect to pipe for the conveyance of water or sewage or for the service of lining and/or coating such pipe:

(1) Coercing or inducing others to restrict their production to certain sizes or types of the aforesaid pipe;

(2) Coercing or inducing others to restrict their sales to any territory;

(3) Quoting or bidding any job only on an "all or nothing" basis;

(4) Coercing or inducing contractors to enter agreements to deal with one supplier only before the opening of bids;

(5) Communicating to or exchanging with any manufacturer, distributor or seller of pipe for the conveyance of water or sewage or with any company providing the services of lining or coating such pipe any information concerning bids, prices, terms or conditions of sale.

(c) That the Court order each defendant for a period of five (5) years to certify in writing, through one of its officers, at the time of every

succeeding change in published prices, "estimating prices," terms, or conditions of sale of pipe, for the conveyance of water or sewage, that said change was independently arrived at by said defendant and was not the result of any agreement or understanding with any competitor; and further that each defendant retain in its files the aforesaid certifications which shall be made available to plaintiff for inspection upon reasonable written demand.

(d) That the Court order that each defendant maintain, for a period of five (5) years from the date of entry of final judgment herein, a record of all meetings attended by any of its officers, directors, or employees having managerial or supervisory authority in connection with the sale or pricing of pipe, for the conveyance of water or sewage, and similar representatives of any of its competitors; said records shall include the dates and places of said meetings, the names of all persons in attendance, and a listing of the topics discussed thereat; said reports shall be made available to plaintiff for inspection upon reasonable written demand.

(e) That the Court order each defendant to annex to every sealed bid or quotation on pipe for the conveyance of water or sewage a written certification by an officer of said defendant, or by the official of said defendant having authority to determine the bid or quotation involved, that said bid or quotation was not the result of any agreement, understanding, or communication between the defendant and any of its competitors.

(f) That plaintiff have such other, further, and different relief as the Court may deem just and proper in the premises.

(g) That plaintiff recover the costs of this suit.

Dated: October 28, 1964.

/s/ Nicholas deB. Katzenbach
NICHOLAS deB. KATZENBACH
Acting Attorney General

/s/ William H. Orrick, Jr.
WILLIAM H. ORRICK, JR.
Assistant Attorney General

/s/ Harry G. Sklarsky
HARRY G. SKLARSKY
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/s/ Thomas R. Sheridan
THOMAS R. SHERIDAN
United States Attorney

/s/ Stanley E. Disney
STANLEY E. DISNEY
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/s/ Barbara J. Svedberg
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/s/ Herbert A. Karzen
HERBERT A. KARZEN

/s/ John J. Schimmenti
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Attorneys, Department of Justice

Filed October 28, 1964.

First Amended Complaint.

(Injunction and Money Damages).

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, vs. U.S. Industries, Inc.; Smith-Scott Co., Inc.; United States Steel Corporation; American Pipe and Construction Co.; and United Concrete Pipe Corp., Defendants. Civil No. 64-835-HW.

The United States of America, plaintiff herein, by its attorneys, brings this action against the defendants named herein in three counts. As a first claim the United States of America in its capacity as purchaser of alternate small diameter pressure pipe for use by Federal agencies, brings this suit under the False Claims Act (31 U.S.C. §§ 231-233) for double the amount of damages sustained, plus forfeitures (Count One), and as a second claim, alternatively, under Section 4A of the Clayton Act (15 U.S.C. § 15A) to recover its actual damages (Count Two). This plaintiff waives its right of recovery under Counts I and II hereof for any purchase for which it recovers damages under any other complaint concerning related conspiracies, filed by the plaintiff concurrently with the filing of this complaint.

As a third claim, the United States of America brings this suit under Section 4 of the Sherman Act (15 U.S.C. § 4,), in order to prevent and restrain continuing violation by the defendants, as hereinafter alleged, of Section 1 of said Act (15 U.S.C. § 1) (Count III).

COUNT I

1. As a first claim, the United States of America in its capacity as purchaser of alternate small diameter pressure pipe for use by those Federal governmental organizations engaged in the construction of systems to convey water and sewage throughout the western area of the United States, brings this suit under Sections 3490, 3491, 3492 and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233), commonly known as the False Claims Act.

2. Each of the defendants maintains an office, transacts business and is found within the Southern District of California.

3. Each of the corporations listed below is made a defendant herein. Each of said corporations is organized and exists under the laws of the State indicated. Each defendant was engaged in the business of manufacturing and of selling alternate small diameter pressure pipe, principally in the city indicated, in the western area during the time of the conspracy alleged herein.

Name of Company	State of Incorporation	Place of Business
U.S. Industries, Inc. (referred to herein as USI)	Delaware	Azusa, California
Smith-Scott Co. Inc. (referred to herein as Smith-Scott)	California	Riverside, California
United States Steel Corporation (referred to herein as U.S. Steel)	New Jersey	Linden, Utah
American Pipe and Construction Co. (referred to as American)	California	Monterey Park, California
United Concrete Pipe Corp. (referred to as United)	California	Baldwin Park, California

4. Inasmuch as all defendants are corporations, no defendant is in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States.

5. The acts alleged in this complaint to have been done by each of the defendants were authorized, ordered, or done by the officers, agents, employees, or representatives of each defendant while actively engaged in the management, direction, or control of its affairs.

6. American Concrete Pipe Co., engaged in the business of manufacturing and of selling concrete pipe in the western area, is a subsidiary of American and is incorporated in the State of Arizona. It and various other companies not made defendants herein, participated as co-conspirators in the combination and conspiracy hereinafter charged and have performed acts and made statements in furtherance thereof.

7. As used herein, the term:

(a) "Steel small diameter pressure pipe" or "steel SDP pipe" means thin walled welded steel pipe, manufactured from steel plate in diameters of 12 inches to 48 inches and sold for the conveyance of water and sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch;

(b) "Concrete small diameter pressure pipe" or "concrete SDP pipe" means concrete cylinder pipe, which utilizes steel sheets or skelp in its manufacture, in diameters from 12 inches to 48 inches and sold for the conveyance of water or sewage under internal pressure exceeding 115 feet of head or 50 pounds per square inch;

(c) "Alternate small diameter pressure pipe" or "alternate SDP pipe" means pipe which is manufactured and sold, or offered for sale in jobs where the specifications permit the use of either concrete SDP pipe or steel SDP pipe;

(d) "Metal components" refers to steel plate, sheets, skelp, rods, wire and mesh used in the manufacture of alternate SDP pipe;

(e) "Western area" refers to California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho, and Hawaii; and

(f) "End users" means customers who purchase and install or have installed alternate SDP pipe.

8. The construction of systems utilizing alternate SDP pipe is often contracted for by the end user with general contractors on the basis of sealed competitive bids. The end users draft or have drafted the specifications where this is appropriate, so that either concrete SDP pipe or steel SDP pipe can be used in the system. Prior to submitting bids to the end user, the general contractors solicit quotations from pipe manufacturers for the purchase price of the pipe delivered to the site where the pipe is to be installed. Thus the pipe manufacturer knows who the end user will be. The award winning contractor purchases the pipe from the low quoting pipe manufacturer at the price quoted by the latter and passes this price along to the end user. End users also purchase pipe directly from pipe manufacturers usually on the basis of sealed competitive bids.

9. The corporate defendants are the principal manufacturers of alternate SDP pipe in the western area

and during the period 1958 through 1961 their average annual sales of alternate SDP pipe in the western area were at least $18,000,000. Because of the relatively limited number of manufacturers of alternate SDP pipe, general contractors and end users where the specifications permit the use of alternate SDP pipe, frequently solicit bids both from manufacturers of concrete SDP pipe and from manufacturers of steel SDP pipe, and frequently they solicit bids for said pipe from manufacturers outside the State where said pipe is to be installed. Manufacturers of said pipe usually manufacture the pipe for a particular job only after receiving an order for it. Said manufacturers customarily identify each section of pipe so as to designate its position in the pipe line and deliver or have delivered said pipe direct to the trench site or as near as possible to the place where it will be installed. During the period of time covered by this complaint, the defendants herein have manufactured substantial quantities of alternate SDP pipe at their plants within the western area, and have sold, shipped, and delivered said pipe to job sites outside the State where it was manufactured. Thus said alternate SDP pipe moved in a continuous and uninterrupted flow from the place of manufacture to points of installation outside the State where said pipe was manufactured.

10. Substantial quantities of metal components are used in the manufacture of alternate SDP pipe. The defendant manufacturers purchase said metal components in anticipation of orders or to enable them to fill existing orders for alternate SDP pipe. Substantial quantities of the metal components are produced outside the State where said pipe is manufactured. The movement in interstate commerce of the metal com-

ponents is necessary to the manufacture and sale of alternate SDP pipe by the defendants in the western area and the defendants and co-conspirators are conduits through which said metal components flow in a continuous uninterrupted stream in interstate commerce from the place where said components are produced to the place where the components are incorporated into alternate SDP pipe and on to the final site where said pipe is installed.

11. Any restraint upon free competition in the production or sale of alternate SDP pipe in the western area necessarily and directly restrains and affects the interstate flow of concrete pipe and the metal components used in the construction of said pipe.

12. During the period covered by this complaint, the plaintiff through its various executive departments and agencies has purchased substantial quantities of alternate SDP pipe for use in the construction of systems to convey water and sewage throughout the western area of the United States. Plaintiff purchases some amounts of the said alternate SDP pipe pursuant to direct sealed competitive bidding procedures and in accordance with this practice and for the purpose of letting contracts, it advertised and called for bids from pipe manufacturers, including defendants, seeking to supply alternate SDP pipe to plaintiff. Plaintiff has also purchased some amounts of the said alternate SDP pipe pursuant to direct sealed competitive bidding procedures in accordance with which it advertised and called for bids from general contractors seeking to construct systems to convey water and sewage for plaintiff. Said contractors in turn solicited bids and quotations from the pipe manufacturers, including defendants, for the alternate SDP pipe to be used in the said

system. The bids or quotations tendered by the pipe manufacturers to the contractors were incorporated into the sealed bids submitted by the contractors to the plaintiff. The pipe manufacturers, including defendants and co-conspirators, knew that the bids or quotations which they submitted to the contractor for the alternate SDP pipe would be thus incorporated into the bids submitted by the contractor to the plaintiff, that the price of said alternate SDP pipe represented a substantial portion of the entire bid submitted by the contractor to the plaintiff and that said price would be paid by the plaintiff either directly to the pipe manufacturer or to the contractor, who, in turn, would pay said price to the pipe manufacturer.

13. Beginning in or prior to the year 1955 and continuing thereafter until at least January 1962, the exact dates being to the plaintiff unknown, the defendants, and the co-conspirators knowingly combined, conspired and agreed to defraud and injure the United States by obtaining or aiding to obtain the payment or allowance of false or fraudulent claims under contracts awarded them for the sale of alternate SDP pipe during said period.

14. The aforesaid combination and conspiracy has consisted, among other things, of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of alternate SDP pipe and to allocate and divide orders for the purchase of alternate SDP pipe among themselves.

15. During the period of time covered by this complaint, the defendants and co-conspirators, for the purpose of forming and effectuating the aforesaid combina-

tion and conspiracy, and in furtherance thereof, have done, among other things, the following:

(a) In or before 1955 representatives of the alternate SDP pipe manufacturers reached an agreement which included the following terms:

(i) that sales of alternate SDP pipe would be divided so that a certain per cent of such sales would be obtained by the manufacturers of steel SDP pipe and a certain per cent by the manufacturers of concrete SDP pipe;

(ii) that information would be exchanged regularly between representatives of the concrete SDP pipe manufacturers and representatives of the steel SDP pipe manufacturers to enable each group to keep a record of the amount of business secured by each;

(iii) that bids would be submitted in such a way as to create the semblance of competitive bidding and pricing.

(b) The terms of this agreement were adhered to by the defendants and co-conspirators throughout the period of this complaint except that the percentage ratios were changed from time to time by agreement between the defendants and co-conspirators.

(c) At various times throughout the period of the conspiracy, Charles Eugene Lamar, John Harvey Barbazette and D. N. Chamberlain acted as "negotiators" for the steel SDP pipe manufacturers and Richard J. McConnell, Peter Van Kuran, Lawrence Robert Tollenaere and Corliss Dean acted as "negotiators" for the concrete SDP pipe manufacturers. These individuals passed along in-

formation to other members of their groups as to which group was "in line" for each job as it arose;

(d) Tallies were maintained by representatives of each corporate defendant for the purpose of keeping a record of whether a steel SDP pipe manufacturer or a concrete SDP pipe manufacturer obtained each job;

(e) Jobs for end users were allocated to the steel SDP pipe group or the concrete SDP pipe group of manufacturers at meetings or by telephone conversations between representatives of defendants and co-conspirators.

16. Pursuant to said combination and conspiracy, and as a result of the acts done in furtherance thereof, defendants have been awarded contracts for the sale of alternate SDP pipe, and have received payments thereunder, on the basis of bids and quotations which they submitted and which they falsely or fraudulently represented to be bona fide, independent, competitive, and not the product of any collusion or agreement between the bidders, and the prices of which bids they falsely or fraudulently represented to be normal, reasonable and competitive whereas, in fact, known to defendants but unknown to plaintiff, the said bids submitted were sham and collusive and not the result of open competition, and prices therefor were unreasonable, arbitrary and noncompetitive.

17. With respect to each such contract awarded for the supply of alternate SDP pipe during the aforesaid period of the conspiracy, the defendant to which such contract was awarded presented and/or caused to be presented to plaintiff for payment or approval by it

numerous claims, knowing such claims to be false, fictitious or fraudulent in that such claims were based on a contract which had been falsely or fraudulently procured by reason of the aforesaid bidding practices.

18. As a result of the presentment to it of the aforesaid false or fraudulent claims, and without knowledge thereof, plaintiff has paid the false or fraudulent claims to defendants or to contractors to whom defendants submitted bids.

19. As a result of the illegal combination and conspiracy and the defendants' acts in furtherance thereof, plaintiff has been compelled to pay substantially higher prices for alternate SDP pipe than would have been the case but for the illegal conduct complained of herein, and has been financially damaged by defendants, the amount of which is presently undetermined.

20. WHEREFORE, the United States of America:

(a) Demands judgment against defendants for Two Thousand Dollars ($2,000.00) for the said conspiracy, for double the amount of the damages it has sustained, and for such other forfeitures as are allowable by law, as provided in Sections 3490, 3491, 3492, and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233) together with interest thereon and the costs of this suit; and

(b) Prays that it recover such other amounts and have such other and further relief as the Court shall deem just.

COUNT II

21. As an alternative to the claim alleged in Count I, the United States of America, in its aforesaid capacity as purchaser of alternate SDP pipe for use by

Federal governmental organizations, brings this suit against the defendants under Section 4A of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731, as amended (15 U.S.C. § 15A), entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, to recover damages which it has sustained due to violations by defendants of Section 1 of the Sherman Act (15 U.S.C. § 1).

22. The allegations contained in paragraphs 2, 3, and 5 through 11 of this Complaint are here realleged with the same force and effect as though set forth in full.

23. Beginning in or prior to the year 1955 and continuing thereafter until at least January 1962, the exact dates being to the plaintiff unknown, defendants and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in alternate SDP pipe in the western area, in violation of Section 1 of the Sherman Act.

24. The aforesaid combination and conspiracy has consisted, among other things, of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of alternate SDP pipe and to allocate and divide orders for the purchase of alternate SDP pipe among themselves.

25. During the period of time covered by this Complaint, the defendants and co-conspirators, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, those acts which are alleged in paragraph 15 of the Complaint which are

here realleged with the same force and effect as though set forth in full.

26. The effects of the aforesaid combination and conspiracy were that:

(a) Prices for alternate SDP pipe throughout the western area have been raised, fixed and maintained at high and artificial levels;

(b) Price competition in the sale of alternate SDP pipe throughout the western area has been restrained, suppressed, and eliminated;

(c) Purchasers of alternate SDP pipe throughout the western area have been deprived of the benefits of free competition in the purchase of alternate SDP pipe; and

(d) Public agencies engaged in the construction of systems to convey water and sewage including Federal governmental organizations such as the Bureau of Reclamation and the United States Army Corps of Engineers, have been forced to pay high artificially fixed prices for alternate SDP pipe.

27. Plaintiff had no knowledge of the said combination and conspiracy, or of any facts which might have led to the discovery thereof until August 1960, and it first became fully aware of the scope of the unlawful conspiracy during the course of the grand jury proceedings which culminated in the return of an indictment in this District against USI, Smith-Scott, U.S. Steel, American and United in March 1964. (*United States* v. *United States Industries, Inc.*, Criminal No. 33341.) It could not have uncovered the conspiracy at an earlier date by the exercise of due diligence, inasmuch as the unlawful conspiracy had been fraudulently concealed by defendants.

28. Since at least 1954, plaintiff has purchased substantial quantities of alternate SDP pipe from defendants for use in the western area of the United States. In purchasing said alternate SDP pipe, plaintiff in some instances has invited formal, sealed competitive bids from prospective suppliers, and has generally accepted the price offered by the lowest responsible bidder.

29. As a result of the illegal combination and conspiracy alleged herein, plaintiff has been led and induced by defendants to make contract awards on bids solicited by it during the period covered by this Complaint at prices fixed by said illegal combination and conspiracy, and plaintiff has been denied thereby the benefit of unrestricted competition in prices for alternate SDP pipe. By the operation of defendants' agreement and concert of action herein alleged, plaintiff has been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

30. Plaintiff has also purchased alternate SDP pipe under construction contracts with independent contractors who had purchased said alternate SDP pipe from defendants at high, noncompetitive prices. By the operation of defendants' agreements and concert of action herein alleged, plaintiff has been compelled to pay substantially higher prices under said contracts than would have been the case but for the violations of the antitrust laws herein alleged.

31. As a result of the illegal combination and conspiracy alleged herein, plaintiff United States of America has been injured and financially damaged by defendants, in an amount which is presently undetermined.

32. WHEREFORE, the United States of America:

(a) Prays that the herein alleged combination and conspiracy among defendants be adjudged and decreed to be in unreasonable restraint of interstate trade and commerce and in violation of Section 1 of the Sherman Act;

(b) Demands judgment against defendants for the damages suffered by it due to defendants' violation of the antitrust laws, as provided for in Section 4A of the Clayton Act (15 U.S.C. § 15A), or some lesser amount to the extent that it has recovery under Count I hereof, together with such interest thereon as is permitted by law and the costs of this suit; and

(c) Prays that it recover such other amounts as the Court shall deem just.

COUNT III

33. As a third claim, the United States of America brings this suit under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (15 U.S.C. § 4), as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Section 1 of the Sherman Act (15 U.S.C. § 1).

34. The allegations contained in paragraphs 2, 3 and 5 through 11 of the Complaint are here realleged with the same force and effect as though set forth in full.

35. Beginning in or prior to the year 1955 and continuing thereafter until at least January 1962, the exact dates being to the plaintiff unknown, defendants and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in alternate SDP pipe in the western area, in violation of Section 1 of the Sherman Act.

36. The aforesaid combination and conspiracy has consisted, among other things, of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of alternate SDP pipe and to allocate and divide orders for the purchase of alternate SDP pipe among themselves.

37. The aforesaid unlawful combination and conspiracy was terminated only after plaintiff began its investigation of the conspiracy herein alleged, and will be resumed unless the relief herein prayed for is granted.

38. During the period of time covered by this Complaint, the defendants and co-conspirators, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, those acts which are alleged in paragraph 15 of the Complaint which are here realleged with the same force and effect as though set forth in full.

39. The allegations contained in paragraph 26 of the Complaint are herein realleged with the same force and effect as though set forth in full.

40. WHEREFORE, plaintiff prays:

(a) That the Court adjudge and decree that the defendants, and each of them, have engaged in an unlawful combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act.

(b) That each of the defendants, its successors, assignees, subsidiaries and transferees, and the respective officers, directors, agents, and employees thereof, and all other persons acting or claiming to act on behalf thereof, be perpetually enjoined and restrained from, in any manner, directly or indirectly:

(i) Continuing, maintaining, or renewing the aforesaid combination and conspiracy and from engaging in any other combination, conspiracy, agreement, understanding, or concert of action having a similar purpose or effect and from adopting or following any practice, plan, program, or device having a similar purpose or effect.

(ii) Entering into any agreement, arrangement, concerted activity, or understanding with any other manufacturer, distributor or seller of pipe for the conveyance of water or sewage or with any company providing the services of lining or coating such pipe or with any association of said manufacturers, distributors, or sellers, in relation to said product, products or services, to:

(1) Fix or adopt prices, terms, or conditions of sale;

(2) Maintain or stabilize prices;

(3) Submit noncompetitive, collusive, complimentary, or rigged bids or quotations to any customer;

(4) Allocate or divide orders, territories or customers;

(5) Exchange information concerning bids, prices, terms or conditions of sale;

(6) Exclude or eliminate others from competing;

(iii) With respect to pipe for the conveyance of water or sewage or for the service of lining and/or coating such pipe:

(1) Coercing or inducing others to restrict their production to certain sizes or types of the aforesaid pipe:

(2) Coercing or inducing others to restrict their sales to any territory;

(3) Quoting or bidding any job only on an "all or nothing" basis;

(4) Coercing or inducing contractors to enter agreements to deal with one supplier only before the opening of bids;

(5) Communicating to or exchanging with any manufacturer, distributor or seller of pipe for the conveyance of water and sewage or with any company providing the services of lining or coating such pipe any information concerning bids, prices, terms or conditions of sale;

(c) That the Court order each defendant for a period of five (5) years to certify in writing,

through one of its officers, at the time of every succeeding change in published prices, "estimating prices", terms or conditions of sale of pipe, for the conveyance of water or sewage, that said change was independently arrived at by said defendant and was not the result of any agreement or understanding with any competitor; and further that each defendant retain in its files the aforesaid certifications which shall be made available to plaintiff for inspection upon reasonable written demand.

(d) That the Court order that each defendant maintain, for a period of five (5) years from the date of entry of final judgment herein, a record of all meetings attended by any of its officers, directors, or employees having managerial or supervisory authority in connection with the sale or pricing of pipe, for the conveyance of water or sewage, and similar representatives of any of its competitors; said records shall include the dates and places of said meetings, the names of all persons in attendance, and a listing of the topics discussed thereat; said records shall be made available to plaintiff for inspection upon reasonable written demand.

(e) That the Court order each defendant to annex to every sealed bid or quotation on pipe for the conveyance of water or sewage a written certification by an officer of said defendant, or by the official of said defendant having authority to determine the bid or quotation involved, that said bid or quotation was not the result of any agreement, understanding, or communication between the defendant and any of its competitors.

(f) That plaintiff have such other, further, and different relief as the Court may deem just and proper in the premises.

(g) That plaintiff recover the costs of this suit.

Dated: October 28, 1964

/s/ Nicholas deB. Katzenbach
NICHOLAS deB. KATZENBACH
Acting Attorney General

/s/ William H. Orrick, Jr.
WILLIAM H. ORRICK, JR.
Assistant Attorney General

/s/ Harry G. Sklarsky
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/s/ Thomas R. Sheridan
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/s/ Stanley E. Disney
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/s/ Barbara J. Svedberg
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/s/ Herbert A. Karzen
HERBERT A. KARZEN

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JOHN J. SCHIMMENTI
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Filed October 28, 1964.

First Amended Complaint.

(Injunction and Money Damages).

United States District Court, Southern District of California, Central Division.

United States of America, Plaintiff, vs. United States Steel Corporation; Smith-Scott Co., Inc.; and U.S. Industries, Inc., Defendants. Civil No. 64-836-HW.

The United States of America, plaintiff herein, by its attorneys, brings this action against the defendants named herein in three counts. As a first claim the United States of America in its capacity as purchaser of steel small diameter pressure pipe for use by Federal agencies, brings this suit under the False Claims Act (31 U.S.C. §§ 231-233) for double the amount of damages sustained, plus forfeitures (Count One), and as a second claim, alternatively, under Section 4A of the Clayton Act (15 U.S.C. § 15A) to recover its actual damages (Count Two). The plaintiff waives its right of recovery under Counts I and II hereof for any purchase for which it recovers damages under any other complaint concerning related conspiracies, filed by the plaintiff concurrently with the filing of this complaint.

As a third claim, the United States of America brings this suit under Section 4 of the Sherman Act (15 U.S.C. § 4), in order to prevent and restrain continuing violation by the defendants, as hereinafter alleged, of Section 1 of said Act (15 U.S.C. § 1) (Count Three).

COUNT I

1. As a first claim, the United States of America, in its capacity as purchaser of steel small diameter pressure pipe for use by those Federal governmental

organizations engaged in the construction of systems to convey water and sewage throughout the western area of the United States, brings this suit under 3490, 3491, 3492 and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233), commonly known as the False Claims Act.

2. Each of the defendants maintains an office, transacts business and is found within the Southern District of California.

3. Each of the corporations, listed below is made a defendant herein. Each of said corporations is organized and exists under the laws of the State indicated. Each defendant is engaged in the business of manufacturing and of selling steel small diameter pressure pipe principally in the city indicated in the western area.

Name of Company	State of Incorporation	Place of Business
United States Steel Corporation (referred to herein as U.S. Steel)	New Jersey	Linden, Utah
Smith-Scott Co., Inc. (referred to herein as Smith-Scott)	California	Riverside, California
U.S. Industries, Inc. (referred to herein as USI)	Delaware	Azusa, California

4. Inasmuch as all defendants are corporations, no defendant is in the military or naval forces of the United States, or in the militia called into or actually employed in the service of the United States.

5. The acts alleged in this complaint to have been done by each of the defendants were authorized, ordered, or done by the officers, agents, employees, or representatives of each defendant while actively engaged in the management, direction, or control of its affairs.

6. Certain officers and employees of the corporate defendants participated as co-conspirators in the combination and conspiracy hereinafter charged and have performed acts and made statements in furtherance thereof.

7. As used herein, the term:

(a) "Steel small diameter pressure pipe" (referred to herein as steel SDP pipe), means thin walled welded steel pipe which is manufactured in diameters of 4 inches to 48 inches and sold for the conveyance of water or sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch;

(b) "Western area" refers to California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii; and

(c) "End users" means customers who purchase and install or have installed steel SDP pipe in systems primarily for the conveyance of water or sewage under pressure.

8. Steel SDP pipe is used for the conveyance of drinking water under pressure and for irrigation and sanitation systems. The construction of systems utilizing steel SDP pipe is often contracted for by the end user with general contractors on the basis of sealed competitive bids. Prior to submitting such bids, the general contractors solicit quotations from pipe manufacturers for the purchase price of the pipe delivered to the site where the pipe is to be installed. Thus the pipe manufacturer knows who the end user will be. The award-winning contractor purchases the pipe from the low quoting pipe manufacturer at the price quoted by the latter and passes this price along to the end user.

End users also purchase pipe directly from pipe manufacturers usually on the basis of sealed competitive bids.

9. The corporate defendants are the principal manufacturers of steel SDP pipe in the western area and during the period 1958 through 1961 their average annual sales of concrete pipe in the western area were at least $13,500,000. Because of the relatively limited number of manufacturers of steel SDP pipe, general contractors and end users frequently solicit bids for said pipe from manufacturers outside the State where said pipe is to be installed. Manufacturers of said pipe usually manufacture the pipe for a particular job only after receiving an order for it. Said manufacturers customarily identify each section of pipe so as to designate its position in the pipe line and deliver or have delivered said pipe direct to the trench site or as near as possible to the place where it will be installed. During the period of time covered by this complaint, the defendants herein have manufactured substantial quantities of steel SDP pipe at their plants within the western area, and have sold, shipped, and delivered said pipe to job sites outside the State where it was manufactured. Thus said steel SDP pipe moves in a continuous and uninterrupted flow from the place of manufacturers to points of installation outside the State where said pipe was manufactured.

10. Steel SDP pipe is fabricated largely from steel plate. The defendant manufacturers obtain said steel plate in anticipation of orders or to enable them to fill existing orders for steel SDP pipe. Substantial quantities of the said steel plate are produced outside the State where said pipe is manufactured. The movement in interstate commerce of the steel plate is necessary to

manufacture and sale of steel SDP pipe by the defendants in the western area and the defendants and co-conspirators are conduits through which said steel plate flows in a continuous uninterrupted stream in interstate commerce from the place where said steel plate is produced to the place where it is incorporated into steel SDP pipe and on to the final site where said pipe is installed.

11. Any restraint upon free competition in the production or sale of steel SDP pipe in the western area necessarily and directly restrains and affects the interstate flow of steel SDP pipe and the steel plate used in the construction of said pipe.

12. During the period covered by this complaint the plaintiff through its various executive departments and agencies has purchased substantial quantities of steel SDP pipe for use in the construction of systems to convey water and sewage throughout the western area of the United States. Plaintiff purchases some amounts of the said steel SDP pipe pursuant to direct sealed competitive bidding procedures and in accordance with this practice and for the purpose of letting contracts it advertised and called for bids from pipe manufacturers, including defendants, seeking to supply steel SDP pipe to plaintiff. Plaintiff has also purchased some amounts of the said steel SDP pipe pursuant to direct sealed competitive bidding procedures in accordance with which it advertised and called for bids from general contractors seeking to construct systems to convey water and sewage for plaintiff. Said contractors in turn solicited bids and quotations from the pipe manufacturers, including defendants, for the steel SDP pipe to be used in the said system. The bids or quotations tendered by the pipe manufacturers to the contractors

were incorporated into the sealed bids submitted by the contractors to the plaintiff. The pipe manufacturers, including defendants, knew that the bids or quotations which they submitted to the contractor for the steel SDP pipe would be thus incorporated into the bids submitted by the contractor to the plaintiff, that the price of said steel SDP pipe represented a substantial portion of the entire bid submitted by the contractor to the plaintiff and that said price would be paid by the plaintiff either directly to the pipe manufacturer or to the contractor who, in turn, would pay said price to the pipe manufacturer.

13. Beginning at least as early as May 1958, and continuing thereafter until at least January 1962, the exact dates being to the plaintiff unknown, the defendants and the co-conspirator, knowingly combined, conspired and agreed to defraud and injure the United States by obtaining or aiding to obtain the payment or allowance of false or fraudulent claims under contracts awarded them for the sale of steel SDP pipe during said period.

14. The aforesaid combination and conspiracy has consisted, among other things, of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of steel SDP pipe and to allocate and divide orders for the purchase of steel SDP pipe among themselves.

15. During the period of time covered by this complaint, the defendants and the co-conspirators, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, the following:

(a) In or about 1958 several meetings were held in P. M. Cobb's suit at the Sheraton-West Hotel in Los Angeles attended by P. M. Cobb and J. G. Thompson of U.S. Steel; Paul Allen Wing and William Scott of Smith-Scott; and Don Chamberlain and Charles Eugene Lamar of USI. At these meetings an agreement was reached which included the following terms:

(i) Each company would be entitled to only a certain percentage of the available business in steel SDP pipe in different geographical sites;

(ii) Limitations were placed on the sizes and types of steel SDP pipe each defendant would be allowed to manufacture in the future;

(iii) Meetings would be held between representatives of the three defendants to discuss and decide in advance which defendant would be entitled to submit the lowest bid on each major job known to be scheduled for installation in the near future;

(iv) Information would be exchanged regularly between representatives of the three companies to enable each participant to keep a record of the amount of business secured by each participant;

(v) Before final bids or quotations were submitted on each job of any importance, agreement would be reached by representatives of the participants on the dollar amount to be bid by each participant based on minimum discounts from standardized price lists;

(vi) Bids would be submitted in such a way as to create the semblance of competitive bidding and pricing;

(b) The terms of this agreement were adhered to by the defendants throughout the period of this complaint except that the percentage ratios were changed from time to time by agreement among the defendants;

(c) Subsequent meetings were held at various locations including the Sheraton-West Hotel in Los Angeles and the Uplander Hotel in Upland, California, and numerous phone calls were made between representatives of defendants at which future jobs were discussed by James Greer Thompson and Norman David Lindley of U.S. Steel; Charles Eugene Lamar, D. N. Chamberlain, John Harvey Barbazette, and John Allan Ellis of USI; and Frank Cook and Paul Allen Wing of Smith-Scott.

16. Pursuant to said combination and conspiracy, and as a result of the acts done in furtherance thereof, defendants have been awarded contracts for the sale of steel SDP pipe, and have received payments thereunder, on the basis of bids and quotations which they submitted and which they falsely or fraudulently represented to be bona fide, independent, competitive, and not the product of any collusion or agreement between the bidders, and the prices of which bids they further falsely or fraudulently represented to be normal, reasonable and competitive whereas, in fact known to defendants but unknown to plaintiff, the said bids submitted were sham and collusive and not the result of open competition, and prices therefor were unreasonable, arbitrary, and non-competitive.

17. With respect to each such contract awarded for the supply of steel SDP pipe during the aforesaid

period of the conspiracy, the defendant to which such contract was awarded presented and/or caused to be presented to plaintiff for payment or approval by it numerous claims, knowing such claims to be false, fictitious or fraudulent in that such claims were based on a contract which had been falsely or fraudulently procured by reason of the aforesaid bidding practices.

18. As a result of the presentment to it of the aforesaid false or fraudulent claims, and without knowledge thereof, plaintiff has paid the false or fraudulent claims to defendants or contractors to whom defendants submitted bids.

19. As a result of the illegal combination and conspiracy and the defendants' acts in furtherance thereof, plaintiff has been compelled to pay substantially higher prices for steel SDP pipe than would have been the case but for the illegal conduct complained of herein, and has been financially damaged by defendants, the amount of which is presently undetermined.

20. WHEREFORE, the United States of America:

(a) Demands judgment against defendants for Two Thousand Dollars ($2,000.00) for the said conspiracy, for double the amount of the damages it has sustained, and for such other forfeitures as are allowable by law, as provided in Sections 3490, 3491, 3492 and 5438 of the Revised Statutes (31 U.S.C. §§ 231-233) together with interest thereon and the costs of this suit; and

(b) Prays that it recover such other amounts and have such other and further relief as the Court shall deem just.

Count II

21. As an alternative to the claim alleged in Count One, the United States of America, in its aforesaid capacity as purchaser of steel SDP pipe for use by Federal governmental organizations, brings this suit against the defendants under Section 4A of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731, as amended (15 U.S.C. § 15A), entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, to recover damages which it has sustained due to violations by defendants of Section 1 of the Sherman Act (15 U.S.C. § 1).

22. The allegations contained in paragraphs 2, 3, and 5 through 11 of this Complaint are here realleged with the same force and effect as though set forth in full.

23. Beginning at least as early as May 1958, and continuing thereafter until at least January 1962, the exact date being to the plaintiff unknown, defendants and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of interstate commerce in steel SDP pipe in the western area, in violation of Section 1 of the Sherman Act.

24. The aforesaid combination and conspiracy has consisted, among other things, of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of steel SDP pipe and to allocate and divide orders for the purchase of steel SDP pipe among themselves.

25. During the period of time covered by this complaint, the defendants and co-conspirators, for the

purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, those acts which are alleged in paragraph 15 of the Complaint which are here realleged with the same force and effect as though set forth in full.

26. The effects of the aforesaid combination and conspiracy were that:

(a) Prices for steel SDP pipe throughout the western area have been raised, fixed and maintained at high and artificial levels;

(b) Price competition in the sale of steel SDP pipe throughout the western area has been restrained, suppressed, and eliminated;

(c) Purchasers of steel SDP pipe throughout the western area have been deprived of the benefits of free competition in the purchase of steel SDP pipe; and

(d) Public agencies engaged in the construction of systems to convey water and sewage including Federal governmental organizations such as the Bureau of Reclamation and the United States Army Corps of Engineers, have been forced to pay high artificially fixed prices for steel SDP pipe.

27. Plaintiff had no knowledge of the said combination and conspiracy, or of any facts which might have led to the discovery thereof until August 1960, and it first became fully aware of the scope of the unlawful conspiracy during the course of the grand jury proceedings which culminated in the return of an indictment in this District against U.S. Steel, Smith-Scott, and USI in March 1964 (*United States v. United*

States Steel Corporation, Criminal No. 33342). It could not have uncovered the conspiracy at an earlier date by the exercise of due diligence, inasmuch as the unlawful conspiracy had been fraudulently concealed by defendants.

28. Since at least 1955, plaintiff has purchased substantial quantities of steel SDP pipe from defendants for use in the western area of the United States. In purchasing said steel SDP pipe, plaintiff in some instances has invited formal, scaled competitive bids from prospective suppliers, including defendants, and has generally accepted the price offered by the lowest responsible bidder.

29. As a result of the illegal combination and conspiracy alleged herein, plaintiff has been led and induced by defendants to make contract awards on bids solicited by it during the period covered by this complaint at prices fixed by said illegal combination and conspiracy, and plaintiff has been denied thereby the benefit of unrestricted competition in prices for steel SDP pipe. By the operation of defendants' agreement and concert of action herein alleged, plaintiff has been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

30. Plaintiff has also purchased steel SDP pipe under construction contracts with independent contractors who had purchased said steel SDP pipe from defendants at high, noncompetitive prices. By the operation of defendants' agreements and concert of action herein alleged, plaintiff has been compelled to pay substantially higher prices under said contracts than would have been the case but for the violations of the antitrust laws herein alleged.

31. As a result of the illegal combination and conspiracy alleged herein, the plaintiff, United States of America, has been injured and financially damaged by defendants, in an amount which is presently undetermined.

32. WHEREFORE, the United States of America:

(a) Prays that the herein alleged combination and conspiracy among defendants be adjudged and decreed to be in unreasonable restraint of interstate trade and commerce and in violation of Section 1 of the Sherman Act;

(b) Demands judgment against defendants for the damages suffered by it due to defendants' violation of the antitrust laws, as provided for in Section 4A of the Clayton Act (15 U.S.C. § 15A), or some lesser amount to the extent that it has recovery under Count I hereof, together with such interest thereon as is permitted by law and the costs of this suit; and

(c) Prays that it recover such other amounts as the Court shall deem just.

Count III

33. As a third claim, the United States of America brings this suit under Section 4 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209 (15 U.S.C. § 4), as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", commonly known as the Sherman Act, in order to prevent and restrain continuing violations by the defendants, as hereinafter alleged, of Section 1 of the Sherman Act (15 U.S.C. § 1).

34. The allegations contained in paragraphs 2, 3 and 5 through 11 of the Complaint are here realleged with the same force and effect as though set forth in full.

35. Beginning at least as early as May 1958 and continuing thereafter until at least January 1962, the exact dates being to the plaintiff unknown, defendants and co-conspirators have engaged in a combination and conspiracy in unreasonable restraint of interstate trade and commerce in steel SDP pipe in the western area, in violation of Section 1 of the Sherman Act.

36. The aforesaid combination and conspiracy has consisted, among other things, of a continuing agreement, understanding, and concert of action among the defendants and co-conspirators to submit collusive and rigged bids for the sale of steel SDP pipe and to allocate and divide orders for the purchase of steel SDP pipe among themselves.

37. The aforesaid unlawful combination and conspiracy was terminated only after plaintiff began its investigation of the conspiracy herein alleged, and will be resumed unless the relief herein prayed for is granted.

38. During the period of time covered by this complaint, the defendants and co-conspirators, for the purpose of forming and effectuating the aforesaid combination and conspiracy, and in furtherance thereof, have done, among other things, those acts which are alleged in paragraph 15 of the Complaint which are here realleged with the same force and effect as though set forth in full.

39. The allegations contained in paragraph 26 of the Complaint are here realleged with the same force and effect as though set forth in full.

40. WHEREFORE, plaintiff prays:

(a) That the Court adjudged and decree that the defendants, and each of them, have engaged in an unlawful combination and conspiracy in unreasonable restraint of the aforesaid interstate trade and commerce in violation of Section 1 of the Sherman Act;

(b) That each of the defendants, its successors, assignees, subsidiaries and transferees, and the respective officers, directors, agents, and employees thereof, and all other persons acting or claiming to act on behalf thereof, be perpetually enjoined and restrained from, in any manner, directly or indirectly:

(i) Continuing, maintaining, or renewing the aforesaid combination and conspiracy and from engaging in any other combination, conspiracy, agreement, understanding, or concert of action having a similar purpose or effect and from adopting or following any practice, plan, program, or device having a similar purpose or effect;

(ii) Entering into any agreement, arrangement, concerted activity, or understanding with any other manufacturer, distributor or seller of pipe for the conveyance of water or sewage or with any company providing the services of lining or coating such pipe or with any association of said manufacturers, distributors, or sellers, in relation to said product, products or services, to:

(1) Fix or adopt prices, terms, or conditions of sale;

(2) Maintain or stabilize prices;

(3) Submit non-competitive, collusive, complimentary, or rigged bids or quotations to any customer;

(4) Allocate or divide orders, territories or customers;

(5) Exchange information concerning bids, prices, terms or conditions of sale;

(6) Exclude or eliminate others from competing;

(iii) With respect to pipe for the conveyance of water or sewage or for the service of lining and/or coating such pipe:

(1) Coercing or inducing others to restrict their production to certain sizes or types of the aforesaid pipe;

(2) Coercing or inducing others to restrict their sales to any territory;

(3) Quoting or bidding any job only on an "all or nothing" basis;

(4) Coercing or inducing contractors to enter agreements to deal with one supplier only before the opening of bids;

(5) Communicating to or exchanging with any manufacturer, distributor or seller of pipe for the conveyance of water or sewage or with any company providing the services of lining or coating such pipe any information concerning bids, prices, terms or conditions of sale;

(c) That the Court order each defendant for a period of five (5) years to certify in writing,

through one of its officers, at the time of every succeeding change in published prices, "estimating prices", terms, or conditions of sale of pipe; for the conveyance of water or sewage, that said change was independently arrived at by said defendant and was not the result of any agreement or understanding with any competitor; and further, that each defendant retain in its files the aforesaid certifications which shall be made available to plaintiff for inspection upon reasonable written demand;

(d) That the Court order that each defendant maintain, for a period of five (5) years from the date of entry of final judgment herein, a record of all meetings attended by any of its officers, directors, or employees having managerial or supervisory authority in connection with the sale or pricing of pipe, for the conveyance of water or sewage, and similar representatives of any of its competitors; said records shall include the dates and places of said meetings, the names of all persons in attendance, and a listing of the topics discussed thereat; said records shall be made available to plaintiff for inspection upon reasonable written demand;

(e) That the Court order each defendant to annex to every sealed bid or quotation on pipe for the conveyance of water or sewage a written certification by an officer of said defendant, or by the official of said defendant having authority to determine the bid or quotation involved, that said bid or quotation was not the result of any agreement, understanding, or communication between the defendant and any of its competitors;

(f) That plaintiff have such other, further, and different relief as the Court may deem just and proper in the premises;

(g) That plaintiff recover the costs of this suit.

Dated: October 28, 1964.

/s/ Nicholas deB. Katzenbach
NICHOLAS deB. KATZENBACH
Acting Attorney General

/s/ William H. Orrick, Jr.
WILLIAM H. ORRICK, JR.
Assistant Attorney General

/s/ Harry G. Sklarsky
HARRY G. SKLARSKY
Attorney, Department of Justice

/s/ Thomas R. Sheridan
THOMAS R. SHERIDAN
United States Attorney

/s/ Stanley E. Disney
STANLEY E. DISNEY
Attorney, Department of Justice

/s/ Barbara J. Svedberg
BARBARA J. SVEDBERG

/s/ Herbert A. Karzen
HERBERT A. KARZEN

/s/ John J. Schimmenti
JOHN J. SCHIMMENTI
Attorneys, Department of Justice

Filed October 28, 1964.

Partial Final Judgment.

United States District Court, Central District of California.

United States of America, Plaintiff, vs. American Pipe and Construction Co., and United Concrete Pipe Corporation, Defendants. Civil No. 64-832-MP.

Plaintiff, United States of America, having filed its complaint herein on June 23, 1964, its first amended complaint on October 28, 1964 and its second amended complaint on December 2, 1965, and the consenting defendant, United Concrete Pipe Corporation, having appeared by its attorneys and having filed its answer to such complaint denying the substantive allegations thereof; and plaintiff and consenting defendant, by their respective attorneys, having severally consented to the making and entry of this Partial Final Judgment pursuant to a stipulation entered into on September 28, 1967, without trial or adjudication of or finding on any issue of fact or law herein, and without this Partial Final Judgment constituting any evidence or admission by either party to said stipulation with respect to any such issue, and the Court having considered the matter and being duly advised,

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties as aforesaid,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I

This Court has jurisdiction of the subject matter hereof and of the consenting defendant. The second amended complaint herein having presented more

than one claim for relief and dismissal being sought as to Counts I and II, based on a partial price adjustment, the Court hereby determines that there is no just reason for delay and directs entry of this Partial Final Judgment as to the claim made in Count III.

The Second amended complaint in Count III states a claim upon which relief may be granted under Section 1 of the Act of Congress of July 2, 1890 entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

As used in this Partial Final Judgment:

A. "Pipe" means pipe constructed of concrete either with or without metal components, including both pressure and nonpressure pipe, sold and/or manufactured by the consenting defendant within the Western Area, as that term is hereinafter defined, for the conveyance of water or sewage;

B. "Western Area" means California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii; and

C. "Person" means an individual, partnership, firm, association, corporation or other legal or business entity.

III

The provisions of this Partial Final Judgment applicable to the consenting defendant shall also apply to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with the consenting defendant who shall have received actual no-

tice of this Partial Final Judgment by personal service or otherwise, but shall not apply to transactions solely between the consenting defendant and its officers, directors or employees when acting in such capacity, or between the consenting defendant and its parent company, or between the consenting defendant and any of its subsidiaries or any subsidiary of its parent. This Partial Final Judgment shall not apply to conduct outside of the United States unless such conduct substantially affects the foreign or domestic commerce of the United States, but shall apply to sales by the consenting defendant to, or for the unknown use of, the plaintiff or any instrumentality or agency thereof.

IV

The consenting defendant is enjoined and restrained from directly or indirectly in any manner entering into, adhering to, or claiming any right under, any contract, agreement, arrangement, understanding, plan or program with any other manufacturer or seller of pipe, or with any association of said manufacturers, or with any company providing the services of lining or coating of pipe, in relation to pipe, to:

A. Fix or adopt prices, terms or conditions of sale;

B. Maintain or adhere to agreed upon prices;

C. Submit noncompetitive, collusive or rigged bids or quotations to any customer;

D. Allocate or divide orders, territories or customers;

E. Communicate with any manufacturer or seller of pipe or with any company providing the services of lining or coating pipe, information about any specific job concerning bids, prices, terms or conditions

applicable to the sale of pipe to third persons before the bid opening of any such specific job or, in the absence of such bid opening, until after the release of such information publicly or to the trade generally; or

F. Restrict production to certain types or sizes of pipe or restrict sales of pipe to any specified territory.

V

The consenting defendant is enjoined and restrained from:

A. Communicating with any other manufacturer of pipe for the purpose of attempting to coerce or force such manufacturer to restrict its sales of pipe to any territory or to restrict its production of pipe to certain sizes or types;

B. Communicating with any manufacturer or seller of pipe or with any company providing the services of lining or coating pipe, information about any specific job concerning bids, prices, terms or conditions applicable to the sale of pipe to third persons before the bid opening of any such specific job, or, in the absence of such bid opening, until after the release of such information publicly or to the trade generally.

VI

The consenting defendant is ordered and directed for a period of five years from the date of entry of this Partial Final Judgment:

A. In connection with any sealed bid submitted by it to any Federal, State or local government authority, agency, or instrumentality for the sale of pipe, to supply, concurrently or within a reasonable time thereafter, a written certification by an officer or employee of the consenting defendant regularly having the

authority to determine the price for the type of bid involved, in substantially the form of Appendix A hereto or containing the substance thereof;

B. In connection with any formal written quotation for the sale of pipe in excess of $25,000 to annex to such written quotation or include therein a written certification by an officer or employee of the consenting defendant regularly having the authority to determine the price for the type of quotation involved, in substantially the form of Appendix B hereto or containing the substance thereof;

C. To certify in writing through one of its officers or an employee of the consenting defendant regularly having the authority to determine published prices, at the time of every generally published revision of its published prices, terms or conditions of sale of pipe, that the decision to make such change was independently arrived at by the consenting defendant and not as the result of any agreement or understanding with any competitor, and further to retain in its files the aforesaid certifications for a period of five years from the date thereof, which certifications shall be made available to plaintiff for inspection upon reasonable written demand.

VII

Nothing contained in this Partial Final Judgment shall be deemed to prohibit the consenting defendant from:

A. Communicating to any other person, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the sale of pipe in connection with any proposed or actual bona fide purchase or sale or subcontract between them, or entering into or performing any such transaction.

B. Furnishing to distributors of its pipe suggested prices, terms or conditions relating to the resale of such pipe, or prescribing such prices, terms or conditions where it is otherwise lawful to do so;

C. Communicating to any other person providing the services of lining or coating pipe, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the lining or coating of pipe in connection with any proposed or actual bona fide transaction between them for the lining or for coating of pipe, or entering into or performing any such transaction; and

D. Communicating to any other person, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the sale of pipe in connection with any proposed or actual bona fide joint bid, quotation or joint venture by or between the consenting defendant and any other defendant in this action or any other person, where the job is of such size or nature or performable at such time, that in good faith the consenting defendant believes that it is undesirable to handle the entire job alone and the transaction is denominated as or is known to the purchaser to be a joint bid, quotation or joint venture, or entering into or performing any such transaction.

VIII

The consenting defendant is ordered and directed within 60 days from the date of entry of this Partial Final Judgment to furnish a copy of this Partial Final Judgment to each of its officers, plant managers, sales managers and assistant sales managers in the Western Area who are directly involved in the production or

sale of pipe, and to their successors within 30 days after hiring or appointment, and to retain in its files for a period of five years from the date of this Partial Final Judgment a written statement signed within 60 days after receipt thereof by each such employee setting forth the date he received a copy of this Partial Final Judgment, his title, his place of employment and the name of his immediate superior.

IX

For the purpose of determining or securing compliance with this Partial Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the consenting defendant made to its principal office, be permitted, subject to any legally recognized privilege:

A. Reasonable access, during office hours of the consenting defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the consenting defendant, relating to any matters contained in this Partial Final Judgment; and

B. Subject to the reasonable convenience of the consenting defendant and without restraint or interference from it, to interview officers or employees of the consenting defendant, who may have counsel present, regarding any such matters.

Upon such written request the consenting defendant shall submit such reports in writing with respect to any of the matters contained in this Partial Final Judgment as may from time to time be requested for the enforcement of this Partial Final Judgment.

No information obtained by the means provided in this Section IX shall be divulged by any representative of the Department of Justice to anyone other than a duly authorized representative of the executive branch of the plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Partial Final Judgment or as otherwise required by law.

X

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Partial Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Partial Final Judgment, for the modification or termination of any of the provisions hereof, for the enforcement of compliance herewith and for the punishment of violations hereof.

Dated: Dec. 8, 1967

/s/ Martin Pence
United States District Judge

APPENDIX A

By submitting this bid the undersigned hereby certifies that said bid has not been made or prepared in collusion with any other manufacturer of pipe and that the prices, terms or conditions applicable to the sale thereof have not been communicated by or on behalf of the bidder to any such manufacturer and will not be so communicated to any such manufacturer prior to the official opening of said bid, in violation of any decree entered against bidder by the United States District Court for the Central District of California which may be applicable to said bid.

Dated:

.....

Signature of Officer or Employee of the Corporation

APPENDIX B

By issuing this quotation or any changes thereof, the undersigned certifies that this quotation and any such changes have not been made or prepared in collusion with any other manufacturer of pipe in violation of any decree entered against seller by the United States District Court for the Central District of California which may be applicable to said quotation.

Dated:

.....

Signature of Officer or Employee of the Corporation

Filed December 8, 1967.

[Endorsement omitted in printing]

Entered December 8, 1967.

[Endorsement omitted in printing]

[Certification omitted in printing]

Partial Final Judgment.

United States District Court, Central District of California.

United States of America, Plaintiff, vs. Kaiser Steel Corporation and United States Steel Corporation, Defendants. Civil No. 64-833-MP.

Plaintiff, United States of America, having filed its complaint herein on June 23, 1964, its first amended complaint on October 28, 1964 and its second amended complaint on December 2, 1965, and each of the defendants Kaiser Steel Corporation and United States Steel Corporation, having appeared by its attorneys and each having filed its answer to such complaint denying the substantive allegations thereof; and plaintiff and defendants, by their respective attorneys, having severally consented to the making and entry of this Partial Final Judgment pursuant to a stipulation entered into on September 28, 1967, without trial or adjudication of or finding on any issue of fact or law herein, and without this Partial Final Judgment constituting any evidence or admission by any party to said stipulation with respect to any such issue, and the Court having considered the matter and being duly advised,

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties as aforesaid,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I

This Court has jurisdiction of the subject matter hereof and of each party consenting hereto. The sec-

ond amended complaint herein having presented more than one claim for relief and dismissal being sought as to Counts I and II, based on a partial price adjustment, the Court hereby determines that there is no just reason for delay and directs entry of this Partial Final Judgment as to the claim made in Count III.

The second amended complaint in Count III states a claim upon which relief may be granted under Section 1 of the Act of Congress of July 2, 1890 entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

As used in this Partial Final Judgment:

A. "Pipe" means "steel large diameter pressure pipe" which is heavy walled welded steel pipe which is manufactured in diameters of over 24 inches and sold for the conveyance of water or sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch.

B. "Western Area" means California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii; and

C. "Person" means an individual, partnership, firm, association, corporation or other legal or business entity.

III

The provisions of this Partial Final Judgment applicable to any defendant shall also apply to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendant who shall

have received actual notice of this Partial Final Judgment by personal service or otherwise, but shall not apply to transactions solely between any defendant and its officers, directors, or employees when acting in such capacity, or between any defendant and its parent company, or between any defendant and any of its subsidiaries or any subsidiary of its parent. This Partial Final Judgment shall not apply to conduct outside of the United States unless such conduct substantially affects the foreign or domestic commerce of the United States, but shall apply to sales by any defendant to, or for the known use of, the plaintiff or any instrumentality or agency thereof.

IV

Each of the defendants is enjoined and restrained from directly or indirectly in any manner entering into, adhering to, or claiming any right under, any contract, agreement, arrangement, understanding, plan or program with any other manufacturer or seller of pipe, or with any association of said manufacturers, or with any company providing the services of lining or coating of pipe, in relation to pipe, to:

A. Fix or adopt prices, terms or conditions of sale;

B. Maintain or adhere to agreed upon prices;

C. Submit noncompetitive, collusive or rigged bids or quotations to any customer;

D. Allocate or divide orders, territories or customers;

E. Communicate with any manufacturer or seller of pipe or with any company providing the services of lining or coating pipe, information about any specific job concerning bids, prices, terms or conditions ap-

plicable to the sale of pipe to third persons before the bid opening of any such specific job or, in the absence of such bid opening, until after the release of such information publicly or to the trade generally; or

F. Restrict production to certain types or sizes of pipe or restrict sales of pipe to any specified territory.

V

Each of the defendants is enjoined and restrained from:

A. Communicating with any other manufacturer of pipe for the purpose of attempting to coerce or force such manufacturer to restrict its sales of pipe to any territory or to restrict its production of pipe to certain sizes or types;

B. Communicating with any manufacturer or seller of pipe or with any company providing the services of lining or coating pipe, information about any specific job concerning bids, prices, terms or conditions applicable to the sale of pipe to third persons before the bid opening of any such specific job, or, in the absence of such bid opening, until after the release of such information publicly or to the trade generally.

VI

Each of the defendants is ordered and directed for a period of five years from the date of entry of this Partial Final Judgment:

A. In connection with any sealed bid submitted by it to any Federal, State or local governmental authority, agency, or instrumentality for the sale of pipe, to supply, concurrently or within a reasonable time thereafter, a written certification by an officer or employee of such defendant regularly having the authority to de-

termine the price for the type of bid involved, in substantially the form of Appendix A hereto or containing the substance thereof;

B. In connection with any formal written quotation for the sale of pipe in excess of $25,000 to annex to such written quotation or include therein a written certification by an officer or employee of such defendant regularly having the authority to determine the price for the type of quotation involved, in substantially the form of Appendix B hereto or containing the substance thereof;

C. To certify in writing through one of its officers or an employee of such defendant regularly having the authority to determine published prices, at the time of every generally published revision of its published prices, terms or conditions of sale of pipe, that the decision to make such change was independently arrived at by such defendant and not as the result of any agreement or understanding with any competitor, and further to retain in its files the aforesaid certifications for a period of five years from the date thereof, which certifications shall be made available to plaintiff for inspection upon reasonable written demand.

VII

Nothing contained in this Partial Final Judgment shall be deemed to prohibit either of the defendants from:

A. Communicating to any other person, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the sale of pipe in connection with any proposed or actual bona fide purchase or sale or subcontact be-

tween them, or entering into or performing any such transaction;

B. Furnishing to distributors of its pipe suggested prices, terms or conditions relating to the resale of such pipe, or prescribing such prices, terms or conditions where it is otherwise lawful to do so;

C. Communicating to any other person providing the services of lining or coating pipe, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the lining or coating of pipe in connection with any proposed or actual bona fide transaction between them for the lining or for coating of pipe, or entering into or performing any such transaction; and

D. Communicating to any other person, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the sale of pipe in connection with any proposed or actual bona fide joint bid, quotation or joint venture by or between a defendant and any other defendant in this action or any other person, where the job is of such size or nature, or performable at such time, that in good faith such defendant believes that it is undesirable to handle the entire job alone and the transaction is denominated as or is known to the purchaser to be a joint bid, quotation or joint venture, or entering into or performing any such transaction.

VIII

Each of the defendants is ordered and directed within 60 days from the date of entry of this Partial Final Judgment to furnish a copy of this Partial Final Judgment to each of its officers, plant managers, sales managers and assistant sales managers in the Western Area

who are directly involved in the production or sale of pipe, and to their successors within 30 days after hiring or appointment, and to retain in its files for a period of five years from the date of this Partial Final Judgment a written statement signed within 60 days after receipt thereof by each such employee setting forth the date he received a copy of this Partial Final Judgment, his title, his place of employment and the name of his immediate superior.

IX

For the purpose of determining or securing compliance with this Partial Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege.

A. Reasonable access, during office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant, relating to any matters contained in this Partial Final Judgment; and

B. Subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers or employees of such defendant who may have counsel present, regarding any such matters.

Upon such written request such defendant shall submit such reports in writing with respect to any of the matters contained in this Partial Final Judgment as may from time to time be requested for the enforcement of this Partial Final Judgment.

No information obtained by the means provided in this Section IX shall be divulged by any representative of the Department of Justice to anyone other than a duly authorized representative of the executive branch of the plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Partial Final Judgment or as otherwise required by law.

X

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Partial Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Partial Final Judgment, for the modification or termination of any of the provisions hereof, for the enforcement of compliance herewith and for the punishment of violations hereof.

Dated: Dec. 8, 1967.

/s/ Martin Pence
United States District Judge

APPENDIX A

By submitting this bid the undersigned hereby certifies that said bid has not been made or prepared in collusion with any other manufacturer of pipe and that the prices, terms or conditions applicable to the sale thereof have not been communicated by or on behalf of the bidder to any such manufacturer and will not be so communicated to any such manufacturer prior to the official opening of said bid, in violation of any decree entered against bidder by the United States District Court for the Central District of California which may be applicable to said bid.

DATED:

.....

Signature of Officer or Employee of the Corporation

APPENDIX B

By issuing this quotation or any changes thereof, the undersigned certifies that this quotation and any such changes have not been made or prepared in collusion with any other manufacturer of pipe in violation of any decree entered against seller by the United States District Court for the Central District of California which may be applicable to said quotation.

Dated:

.....

Signature of Officer or Employee of the Corporation

Filed December 8, 1967.

[Endorsement omitted in printing]

Entered December 8, 1967.

[Endorsement omitted in printing]

[Certification omitted in printing]

Partial Final Judgment.

United States District Court, Central District of California.

United States of America, Plaintiff, vs. United Concrete Pipe Corp.; American Pipe and Construction Co.; Kaiser Steel Corporation; and United States Steel Corporation, Defendants. Civil No. 64-834-MP.

Plaintiff, United States of America, having filed its complaint herein on June 23, 1964, its first amended complaint on October 28, 1964 and its second amended complaint on December 2, 1965, and each of the consenting defendants United Concrete Pipe Corporation, Kaiser Steel Corporation and United States Steel Corporation, having appeared by its attorneys and each having filed its answer to such complaint denying the substantive allegations thereof; and plaintiff and consenting defendants, by their respective attorneys, having severally consented to the making and entry of this Partial Final Judgment pursuant to a stipulation entered into on September 28, 1967, without trial or adjudication of or finding on any issue of fact or law herein, and without this Partial Final Judgment constituting any evidence or admission by any party to said stipulation with respect to any such issue, and the Court having considered the matter and being duly advised,

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties as aforesaid,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I

This Court has jurisdiction of the subject matter hereof and of each party consenting hereto. The second amended complaint herein having presented more than one claim for relief and dismissal being sought as to Counts I and II, based on a partial price adjustment, the Court hereby determines that there is no just reason for delay and directs entry of this Partial Final Judgment as to the claim made in Count III.

The second amended complaint in Count III states a claim upon which relief may be granted under Section 1 of the Act of Congress of July 2, 1890 entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

As used in this Partial Final Judgment:

A. "pipe" means "steel large diameter pressure pipe," as hereinafter defined, or "concrete large diameter pressure pipe," as hereinafter defined, which is sold and/or manufactured, or offered for sale, by any consenting defendant within the "Western Area," as hereinafter defined, for the conveyance of water or sewage on jobs where the specifications permit the use of either concrete large diameter pressure pipe or steel large diameter pressure pipe;

B. "steel large diameter pressure pipe" means heavy walled welded steel pipe which is manufactured in diameters of over 24 inches and sold for the conveyance of water or sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch;

C. "concrete large diameter pressure pipe" means concrete pressure pipe, which ordinarily utilizes steel sheets or skelp in its manufacture, in diameters over 24 inches, sold for the conveyance of water and sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch;

D. "Western Area" means California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii; and

E. "person" means an individual, partnership, firm, association, corporation or other legal or business entity.

III

The provisions of this Partial Final Judgment applicable to any consenting defendant shall also apply to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such consenting defendant who shall have received actual notice of this Partial Final Judgment by personal service or otherwise, but shall not apply to transactions solely between any consenting defendant and its officers, directors or employees when acting in such capacity, or between any consenting defendant and its parent company, or between any consenting defendant and any of its subsidiaries or any subsidiary of its parent. This Partial Final Judgment shall not apply to conduct outside of the United States unless such conduct substantially affects the foreign or domestic commerce of the United States, but shall apply to sales by any consenting defendant to, or for the known use of, the plaintiff or any instrumentality or agency thereof.

IV

Each of the consenting defendants is enjoined and restrained from directly or indirectly in any manner entering into, adhering to, or claiming any right under, any contract, agreement, arrangement, understanding, plan or program with any other manufacturer or seller of pipe, or with any association of said manufacturers, or with any company providing the services of lining or coating of pipe, in relation to pipe, to:

A. Fix or adopt prices, terms or conditions of sale;

B. Maintain or adhere to agreed upon prices;

C. Submit noncompetitive, collusive or rigged bids or quotations to any customer;

D. Allocate or divide orders, territories or customers;

E. Communicate with any manufacturer or seller of pipe or with any company providing the services of lining or coating pipe, information about any specific job concerning bids, prices, terms or conditions applicable to the sale of pipe to third persons before the bid opening of any such specific job or, in the absence of such bid opening, until after the release of such information publicly or to the trade generally; or

F. Restrict production to certain types or sizes of pipe or restrict sales of pipe to any specified territory.

V

Each of the consenting defendants is enjoined and restrained from:

A. Communicating with any other manufacturer of pipe for the purpose of attempting to coerce or force such manufacturer to restrict its sales of pipe to any territory or to restrict its production of pipe to certain sizes or types;

B. Communicating with any manufacturer or seller of pipe or with any company providing the services of lining or coating pipe, information about any specific job concerning bids, prices, terms or conditions applicable to the sale of pipe to third persons before the bid opening of any such specific job, or, in the absence of such bid opening, until after the release of such information publicly or to the trade generally.

VI

Each of the consenting defendants is ordered and directed for a period of five years from the date of entry of this Partial Final Judgment:

A. In connection with any sealed bid submitted by it to any Federal, State or local governmental authority, agency, or instrumentality for the sale of pipe, to supply, concurrently or within a reasonable time thereafter, a written certification by an officer or employee of such consenting defendant regularly having the authority to determine the price for the type of bid involved, in substantially the form of Appendix A hereto or containing the substance thereof;

B. In connection with any formal written quotation for the sale of pipe in excess of $25,000 to annex to such written quotation or include therein a written certification by an officer or employee of such consenting defendant regularly having the authority to determine the price for the type of quotation involved, in substantially the form of Appendix B hereto or containing the substance thereof;

C. To certify in writing through one of its officers or an employee of such consenting defendant regularly having the authority to determine published prices, at the time of every generally published revision of its pub-

lished prices, terms or conditions of sale of pipe, that the decision to make such change was independently arrived at by such consenting defendant and not as the result of any agreement or understanding with any competitor, and further to retain in its files the aforesaid certifications for a period of five years from the date thereof, which certifications shall be made available to plaintiff for inspection upon reasonable written demand.

VII

Nothing contained in this Partial Final Judgment shall be deemed to prohibit any of the consenting defendants from:

A. Communicating to any other person, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the sale of pipe in connection with any proposed or actual bona fide purchase or sale or subcontract between them, or entering into or performing any such transaction;

B. Furnishing to distributors of its pipe suggested prices, terms or conditions relating to the resale of such pipe, or prescribing such prices, terms or conditions where it is otherwise lawful to do so;

C. Communicating to any other person providing the services of lining or coating pipe, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the lining or coating of pipe in connection with any proposed or actual bona fide transaction between them for the lin-

ing or for coating of pipe, or entering into or performing any such transaction; and

D. Communicating to any other person, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the sale of pipe in connection with any proposed or actual bona fide joint bid, quotation or joint venture by or between a consenting defendant and any other defendant in this action or any other person, where the job is of such size or nature, or performable at such time, that in good faith such consenting defendant believes that it is undesirable to handle the entire job alone and the transaction is denominated as or is known to the purchaser to be a joint bid, quotation or joint venture, or entering into or performing any such transaction.

VIII

Each of the consenting defendants is ordered and directed within 60 days from the date of entry of this Partial Final Judgment to furnish a copy of this Partial Final Judgment to each of its officers, plant managers, sales managers and assistant sales managers in the Western Area who are directly involved in the production or sale of pipe, and to their successors within 30 days after hiring or appointment, and to retain in its files for a period of five years from the date of this Partial Final Judgment a written statement signed within 60 days after receipt thereof by each such employee setting forth the date he received a copy of this Partial Final Judgment, his title, his place of employment and the name of his immediate superior.

IX

For the purpose of determining or securing compliance with this Partial Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any consenting defendant made to its principal office, be permitted, subject to any legally recognized privilege:

A. Reasonable access, during office hours of such consenting defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such consenting defendant, relating to any matters contained in this Partial Final Judgment; and

B. Subject to the reasonable convenience of such consenting defendant and without restraint or interference from it, to interview officers or employees of such consenting defendant, who may have counsel present, regarding any such matters.

Upon such written request such consenting defendant shall submit such reports in writing with respect to any of the matters contained in this Partial Final Judgment as may from time to time be requested for the enforcement of this Partial Final Judgment.

No information obtained by the means provided in this Section IX shall be divulged by any representative of the Department of Justice to anyone other than a duly authorized representative of the executive branch

of the plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Partial Final Judgment or as otherwise required by law.

X

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Partial Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Partial Final Judgment, for the modification or termination of any of the provisions hereof, for the enforcement of compliance herewith and for the punishment of violations hereof.

Dated: Dec. 8, 1967.

/s/ Martin Pence
United States District Judge

APPENDIX A

By submitting this bid the undersigned hereby certifies that said bid has not been made or prepared in collusion with any other manufacturer of pipe and that the prices, terms or conditions applicable to the sale thereof have not been communicated by or on behalf of the bidder to any such manufacturer and will not be so communicated to any such manufacturer prior to the official opening of said bid, in violation of any decree entered against bidder by the United States District Court for the Central District of California which may be applicable to said bid.

Dated:

.....

Signature of Officer or Employee of the Corporation

APPENDIX B

By issuing this quotation or any changes thereof, the undersigned certifies that this quotation and any such changes have not been made or prepared in collusion with any other manufacturer of pipe in violation of any decree entered against seller by the United States District Court for the Central District of California which may be applicable to said quotation.

Dated:

.....

Signature of Officer or Employee of the Corporation

Filed December 8, 1967.
[Endorsement omitted in printing]

Entered December 8, 1967.
[Endorsement omitted in printing]
[Certification omitted in printing]

Partial Final Judgment.

United States District Court, Central District of California.

United States of America, Plaintiff, vs. U.S. Industries, Inc.; Smith-Scott Co., Inc.; United States Steel Corporation; United Concrete Pipe Corp.; and American Pipe and Construction Co., Defendants. Civil No. 64-835-MP.

Plaintiff, United States of America, having filed its complaint herein on June 23, 1964, its first amended complaint on October 28, 1964 and its second amended complaint on December 2, 1965, and each of the consenting defendants U. S. Industries, Inc., Smith-Scott Co., Inc., United States Steel Corporation and United Concrete Pipe Corporation, having appeared by its attorneys and each having filed its answer to such complaint denying the substantive allegations thereof; and plaintiff and consenting defendants, by their respective attorneys, having severally consented to the making and entry of this Partial Final Judgment pursuant to a stipulation entered into on September 28, 1967, without trial or adjudication of or finding on any issue of fact or law herein, and without this Partial Final Judgment constituting any evidence or admission by any party to said stipulation with respect to any such issue, and the Court having considered the matter and being duly advised,

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties as aforesaid,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I

This Court has jurisdiction of the subject matter hereof and of each party consenting hereto. The second amended complaint herein having presented more than one claim for relief and dismissal being sought as to Counts I and II, based on a partial price adjustment, the Court hereby determines that there is no just reason for delay and directs entry of this Partial Final Judgment as to the claim made in Count III.

The second amended complaint in Count III states a claim upon which relief may be granted under Section 1 of the Act of Congress of July 2, 1890 entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

As used in this Partial Final Judgment:

A. "pipe" means "steel small diameter pressure pipe," as hereinafter defined, or "concrete small diameter pressure pipe," as hereinafter defined, which is sold and/or manufactured, or offered for sale, by any consenting defendant within the "Western Area," as hereinafter defined, for the conveyance of water or sewage on jobs where the specifications permit the use of either concrete small diameter pressure pipe or steel small diameter pressure pipe.

B. "steel small diameter pressure pipe" means thin walled welded steel pipe, manufactured from steel plate in diameters of 12 inches to 48 inches and sold for the conveyance of water and sewage under internal pres-

sures exceeding 115 feet of head or 50 pounds per square inch.

C. "concrete small diameter pressure pipe" means concrete cylinder pipe, which utilizes steel sheets or skelp in its manufacture, in diameters from 12 inches to 48 inches and sold for the conveyance of water or sewage under internal pressure exceeding 115 feet of head or 50 pounds per square inch.

D. "Western Area" means California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii; and

E. "person" means an individual, partnership, firm, association, corporation or other legal or business entity.

III

The provisions of this Partial Final Judgment applicable to any consenting defendant shall also apply to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such consenting defendant who shall have received actual notice of this Partial Final Judgment by personal service or otherwise, but shall not apply to transactions solely between any consenting defendant and its officers, directors or employees when acting in such capacity, or between any consenting defendant and its parent company, or between any consenting defendant and any of its subsidiaries or any subsidiary of its parent. This Partial Final Judgment shall not apply to conduct outside of the United States unless such conduct substantially affects the foreign or domestic commerce of the United States, but shall apply to sales by any consenting defendant to, or for the known use of, the plaintiff or any instrumentality or agency thereof.

IV

Each of the consenting defendants is enjoined and restrained from directly or indirectly in any manner entering into, adhering to, or claiming any right under, any contract, agreement, arrangement, understanding, plan or program with any other manufacturer or seller of pipe, or with any association of said manufacturers, or with any company providing the services of lining or coating of pipe, in relation to pipe, to:

A. Fix or adopt prices, terms or conditions of sale;

B. Maintain or adhere to agreed upon prices;

C. Submit noncompetitive, collusive or rigged bids or quotations to any customer;

D. Allocate or divide orders, territories or customers;

E. Communicate with any manufacturer or seller of pipe or with any company providing the services of lining or coating pipe, information about any specific job concerning bids, prices, terms or conditions applicable to the sale of pipe to third persons before the bid opening of any such specific job or, in the absence of such bid opening, until after the release of such information publicly or to the trade generally; or

F. Restrict production to certain types or sizes of pipe or restrict sales of pipe to any specified territory.

V

Each of the consenting defendants is enjoined and restrained from:

A. Communicating with any other manufacturer of pipe for the purpose of attempting to coerce or force such manufacturer to restrict its sales of pipe to any

territory or to restrict its production of pipe to certain sizes or types;

B. Communicating with any manufacturer or seller of pipe or with any company providing the services of lining or coating pipe, information about any specific job concerning bids, prices, terms or conditions applicable to the sale of pipe to third persons before the bid opening of any such specific job, or, in the absence of such bid opening, until after the release of such information publicly or to the trade generally.

VI

Each of the consenting defendants is ordered and directed for a period of five years from the date of entry of this Partial Final Judgment:

A. In connection with any sealed bid submitted by it to any Federal, State or local governmental authority, agency, or instrumentality for the sale of pipe, to supply, concurrently or within a reasonable time thereafter, a written certification by an officer or employee of such consenting defendant regularly having the authority to determine the price for the type of bid involved, in substantially the form of Appendix A hereto or containing the substance thereof;

B. In connection with any formal written quotation for the sale of pipe in excess of $25,000 to annex to such written quotation or include therein a written certification by an officer or employee of such consenting defendant regularly having the authority to determine the price for the type of quotation involved, in substantially the form of Appendix B hereto or containing the substance thereof;

C. To certify in writing through one of its officers or an employee of such consenting defendant regularly

having the authority to determine published prices, at the time of every generally published revision of its published prices, terms or conditions of sale of pipe, that the decision to make such change was independently arrived at by such consenting defendant and not as the result of any agreement or understanding with any competitor, and further to retain in its files the aforesaid certifications for a period of five years from the date thereof, which certifications shall be made available to plaintiff for inspection upon reasonable written demand.

VII

Nothing contained in this Partial Final Judgment shall be deemed to prohibit any of the consenting defendants from:

A. Communicating to any other person, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the sale of pipe in connection with any proposed or actual bona fide purchase or sale or subcontract between them, or entering into or performing any such transaction;

B. Furnishing to distributors of its pipe suggested prices, terms or conditions relating to the resale of such pipe, or prescribing such prices, terms or conditions where it is otherwise lawful to do so;

C. Communicating to any other person providing the services of lining or coating pipe, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the lining or coating of pipe in connection with any proposed or actual bona fide transaction between them for the lining or for coating of pipe, or entering into or performing any such transaction; and

D. Communicating to any other person, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the sale of pipe in connection with any proposed or actual bona fide joint bid, quotation or joint venture by or between a consenting defendant and any other defendant in this action or any other person, where the job is of such size or nature, or performable at such time, that in good faith such consenting defendant believes that it is undesirable to handle the entire job alone and the transaction is denominated as or is known to the purchaser to be a joint bid, quotation or joint venture, or entering into or performing any such transaction.

VIII

Each of the consenting defendants is ordered and directed within 60 days from the date of entry of this Partial Final Judgment to furnish a copy of this Partial Final Judgment to each of its officers, plant managers, sales managers and assistant sales managers in the Western Area who are directly involved in the production or sale of pipe, and to their successors within 30 days after hiring or appointment, and to retain in its files for a period of five years from the date of this Partial Final Judgment a written statement signed within 60 days after receipt thereof by each such employee setting forth the date he received a copy of this Partial Final Judgment, his title, his place of employment and the name of his immediate superior.

IX

For the purpose of determining or securing compliance with this Partial Final Judgment, duly authorized representatives of the Department of Justice shall, on

written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any consenting defendant made to its principal office, be permitted, subject to any legally recognized privilege:

A. Reasonable access, during office hours of such consenting defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such consenting defendant, relating to any matters contained in this Partial Final Judgment; and

B. Subject to the reasonable convenience of such consenting defendant and without restraint or interference from it, to interview officers or employees of such consenting defendant, who may have counsel present, regarding any such matters.

Upon such written request such consenting defendant shall submit such reports in writing with respect to any of the matters contained in this Partial Final Judgment as may from time to time be requested for the enforcement of this Partial Final Judgment.

No information obtained by the means provided in this Section IX shall be divulged by any representative of the Department of Justice to anyone other than a duly authorized representative of the executive branch of the plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Partial Final Judgment or as otherwise required by law.

X

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Partial Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Partial Final Judgment, for the modification or termination of any of the provisions hereof, for the enforcement of compliance herewith and for the punishment of violations hereof.

Dated: Dec. 8, 1967.

/s/ Martin Pence
United States District Judge

APPENDIX A

By submitting this bid the undersigned hereby certifies that said bid has not been made or prepared in collusion with any other manufacturer of pipe and that the prices, terms or conditions applicable to the sale thereof have not been communicated by or on behalf of the bidder to any such manufacturer and will not be so communicated to any such manufacturer prior to the official opening of said bid, in violation of any decree entered against bidder by the United States District Court for the Central District of California which may be applicable to said bid.

Dated:

.....

Signature of Officer or Employee of the Corporation

APPENDIX B

By issuing this quotation or any changes thereof, the undersigned certifies that this quotation and any such changes have not been made or prepared in collusion with any other manufacturer of pipe in violation of any decree entered against seller by the United States District Court for the Central District of California which may be applicable to said quotation.

Dated:

.....

Signature of Officer or Employee of the Corporation

Filed December 8, 1967.
[Endorsement omitted in printing]

Entered December 8, 1967.
[Endorsement omitted in printing]
[Certification omitted in printing]

Partial Final Judgment.

United States District Court, Central District of California.

United States of America, Plaintiff, vs. United States Steel Corporation; Smith-Scott Co., Inc.; and U.S. Industries, Inc., Defendants. Civil No. 64-836-MP.

Plaintiff, United States of America, having filed its complaint herein on June 23, 1964, its first amended complaint on October 28, 1964 and its second amended complaint on December 2, 1965, and each of the defendants United States Steel Corporation, Smith-Scott Co., Inc. and U.S. Industries, Inc., having appeared by its attorneys and each having filed its answer to such complaint denying the substantive allegations thereof; and plaintiff and defendants, by their respective attorneys, having severally consented to the making and entry of this Partial Final Judgment pursuant to a stipulation entered into on September 28, 1967, without trial or adjudication of or finding on any issue of fact or law herein, and without this Partial Final Judgment constituting any evidence or admission by any party to said stipulation with respect to any such issue, and the Court having considered the matter and being duly advised,

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties as aforesaid,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I

This Court has jurisdiction of the subject matter hereof and of each party consenting hereto. The second

amended complaint herein having presented more than one claim for relief and dismissal being sought as to Counts I and II, based on a partial price adjustment, the Court hereby determines that there is no just reason for delay and directs entry of this Partial Final Judgment as to the claim made in Count III.

The second amended complaint in Count III states a claim upon which relief may be granted under Section 1 of the Act of Congress of July 2, 1890 entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

As used in this Partial Final Judgment:

A. "pipe" means "steel small diameter pressure pipe," which is thin walled welded steel pipe which is manufactured in diameters of 4 inches to 48 inches and sold for the conveyance of water or sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch;

B. "Western Area" means California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii; and

C. "person" means an individual, partnership, firm, association, corporation or other legal or business entity.

III

The provisions of this Partial Final Judgment applicable to any defendant shall also apply to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with such defendant who shall

have received actual notice of this Partial Final Judgment by personal service or otherwise, but shall not apply to transactions solely between any defendant and its officers, directors or employees when acting in such capacity, or between any defendant and its parent company, or between any defendant and any of its subsidiaries or any subsidiary of its parent. This Partial Final Judgment shall not apply to conduct outside of the United States unless such conduct substantially affects the foreign or domestic commerce of the United States, but shall apply to sales by any defendant to, or for the known use of, the plaintiff or any instrumentality or agency thereof.

IV

Each of the defendants is enjoined and restrained from directly or indirectly in any manner entering into, adhering to, or claiming any right under, any contract, agreement, arrangement, understanding, plan or program with any other manufacturer or seller of pipe, or with any association of said manufacturers, or with any company providing the services of lining or coating of pipe, in relation to pipe, to:

A. Fix or adopt prices, terms or conditions of sale;

B. Maintain or adhere to agreed upon prices;

C. Submit noncompetitive, collusive or rigged bids or quotations to any customer;

D. Allocate or divide orders, territories or customers;

E. Communicate with any manufacturer or seller of pipe or with any company providing the service of lining or coating pipe, information about any specific job concerning bids, prices, terms or conditions ap-

plicable to the sale of pipe to third persons before the bid opening of any such specific job or, in the absence of such bid opening, until after the release of such information publicly or to the trade generally; or

F. Restrict production to certain types or sizes of pipe or restrict sales of pipe to any specified territory.

V

Each of the defendants is enjoined and restrained from:

A. Communicating with any other manufacturer of pipe for the purpose of attempting to coerce or force such manufacturer to restrict its sales of pipe to any territory or to restrict its production of pipe to certain sizes or types;

B. Communicating with any manufacturer or seller of pipe or with any company providing the services of lining or coating pipe, information about any specific job concerning bids, prices, terms or conditions applicable to the sale of pipe to third persons before the bid opening of any such specific job, or, in the absence of such bid opening, until after the release of such information publicly or to the trade generally.

VI

Each of the defendants is ordered and directed for a period of five years from the date of entry of this Partial Final Judgment:

A. In connection with any sealed bid submitted by it to any Federal, State or local governmental authority, agency, or instrumentality for the sale of pipe, to supply, concurrently or within a reasonable time thereafter, a written certification by an officer or employee of such defendant regularly having the authority to de-

termine the price for the type of bid involved, in substantially the form of Appendix A hereto or containing the substance thereof;

B. In connection with any formal written quotation for the sale of pipe in excess of $25,000 to annex to such written quotation or include therein a written certification by an officer or employee of such defendant regularly having the authority to determine the price for the type of quotation involved, in substantially the form of Appendix B hereto or containing the substance thereof;

C. To certify in writing through one of its officers or an employee of such defendant regularly having the authority to determine published prices, at the time of every generally published revision of its published prices, terms or conditions of sale of pipe, that the decision to make such change was independently arrived at by such defendant and not as the result of any agreement or understanding with any competitor, and further to retain in its files the aforesaid certifications for a period of five years from the date thereof, which certifications shall be made available to plaintiff for inspection upon reasonable written demand.

VII

Nothing contained in this Partial Final Judgment shall be deemed to prohibit any of the defendants from:

A. Communicating to any other person, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the sale of pipe in connection with any proposed or actual bona fide purchase or sale or subcontract between them, or entering into or performing any such transaction;

B. Furnishing to distributors of its pipe suggested prices, terms or conditions relating to the resale of such pipe, or prescribing such prices, terms or conditions where it is otherwise lawful to do so;

C. Communicating to any other person providing the services of lining or coating pipe, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the lining or coating of pipe in connection with any proposed or actual bona fide transaction between them for the lining or for coating of pipe, or entering into or performing any such transaction; and

D. Communicating to any other person, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the sale of pipe in connection with any proposed or actual bona fide joint bid, quotation or joint venture by or between a defendant and any other defendant in this action or any other person, where the job is of such size or nature, or performable at such time, that in good faith such defendant believes that it is undesirable to handle the entire job alone and the transaction is denominated as or is known to the purchaser to be a joint bid, quotation or joint venture, or entering into or performing any such transaction.

VIII

Each of the defendants is ordered and directed within 60 days from the date of entry of this Partial Final Judgment to furnish a copy of this Partial Final Judgment to each of its officers, plant managers, sales managers and assistant sales managers in the Western Area who are directly involved in the production or sale of pipe, and to their successors within 30 days after hiring

or appointment, and to retain in its files for a period of five years from the date of this Partial Final Judgment a written statement signed within 60 days after receipt thereof by each such employee setting forth the date he received a copy of this Partial Final Judgment, his title, his place of employment and the name of his immediate superior.

IX

For the purpose of determining or securing compliance with this Partial Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege:

A. Reasonable access, during office hours of such defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such defendant, relating to any matters contained in this Partial Final Judgment; and

B. Subject to the reasonable convenience of such defendant and without restraint or interference from it, to interview officers or employees of such defendant, who may have counsel present, regarding any such matters.

Upon such written request such defendant shall submit such reports in writing with respect to any of the matters contained in this Partial Final Judgment as may

from time to time be requested for the enforcement of this Partial Final Judgment.

No information obtained by the means provided in this Section IX shall be divulged by any representative of the Department of Justice to anyone other than a duly authorized representative of the executive branch of the plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Partial Final Judgment or as otherwise required by law.

X

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Partial Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Partial Final Judgment, for the modification or termination of any of the provisions hereof, for the enforcement of compliance herewith and for the punishment of violations hereof.

Dated: Dec. 8, 1967.

/s/ Martin Pence
United States District Judge

APPENDIX A

By submitting this bid the undersigned hereby certifies that said bid has not been made or prepared in collusion with any other manufacturer of pipe and that the prices, terms or conditions applicable to the sale thereof have not been communicated by or on behalf of the bidder to any such manufacturer prior to the official opening of said bid, in violation of any decree entered against bidder by the United States District Court for the Central District of California which may be applicable to said bid.

Dated:

.....

Signature of Officer or Employee of the Corporation

APPENDIX B

By issuing this quotation or any changes thereof, the undersigned certifies that this quotation and any such changes have not been made or prepared in collusion with any other manufacturer of pipe in violation of any decree entered against seller by the United States District Court for the Central District of California which may be applicable to said quotation.

Dated:

.....

Signature of Officer or Employee of the Corporation

Filed December 8, 1967.
[Endorsement omitted in printing]

Entered December 8, 1967.
[Endorsement omitted in printing]
[Certification omitted in printing]

Final Judgment Against American Pipe and Construction Co.

United States District Court, Central District of California.

United States of America, Plaintiff, vs. American Pipe and Construction Co., and United Concrete Pipe Corporation, Defendants. Civil No. 64-832-MP.

Plaintiff, United States of America, having filed its complaint herein on June 23, 1964, its first amended complaint on October 28, 1964 and its second amended complaint on December 2, 1965, and the consenting defendant, American Pipe and Construction Co., having appeared by its attorney and having filed its answer to such complaint denying the substantive allegations thereof; and plaintiff and consenting defendant, by their respective attorneys, having severally consented to the making and entry of this Final Judgment pursuant to a stipulation entered into on April 23, 1968, without trial or adjudication of or finding on any issue of fact or law herein, and without this Final Judgment constituting any evidence or admission by either party to said stipulation with respect to any such issue, and the Court having considered the matter and being duly advised,

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties as aforesaid,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I

This Court has jurisdiction of the subject matter hereof and of the consenting defendant. The second

amended complaint herein having presented more than one claim for relief and dismissal being sought as to Counts I and II, based on a partial price adjustment, the Court hereby determines that there is no just reason for delay and directs entry of this Final Judgment as to the claim made in Count III.

The second amended complaint in Count III states a claim upon which relief may be granted under Section 1 of the Act of Congress of July 2, 1890 entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

As used in this Final Judgment:

A. "pipe" means pipe constructed of concrete either with or without metal components, including both pressure and nonpressure pipe, sold and/or manufactured by the consenting defendant within the Western Area, as that term is hereinafter defined, for the conveyance of water or sewage;

B. "Western Area" means California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii; and

C. "person" means an individual, partnership, firm, association, corporation or other legal or business entity.

III

The provisions of this Final Judgment applicable to the consenting defendant shall also apply to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with the consenting defendant

who shall have received actual notice of this Final Judgment by personal service or otherwise, but shall not apply to transactions solely between the consenting defendant and its officers, directors or employees when acting in such capacity, or between the consenting defendant and any of its subsidiaries. This Final Judgment shall not apply to conduct outside of the United States unless such conduct substantially affects the foreign or domestic commerce of the United States, but shall apply to sales by the consenting defendant to, or for the known use of, the plaintiff or any instrumentality or agency thereof.

IV

The consenting defendant is enjoined and restrained from directly or indirectly in any manner entering into, adhering to, or claiming any right under, any contract, agreement, arrangement, understanding, plan or program with any other manufacturer or seller of pipe, or with any association of said manufacturers, or with any company providing the services of lining or coating of pipe, in relation to pipe, to:

A. Fix or adopt prices, terms or conditions of sale;

B. Maintain or adhere to agreed upon prices;

C. Submit noncompetitive, collusive or rigged bids or quotations to any customer;

D. Allocate or divide orders, territories or customers;

E. Communicate with any manufacturer or seller of pipe or with any company providing the services of lining or coating pipe, information about any specific job concerning bids, prices, terms or conditions applicable to the sale of pipe to third persons before the bid

opening of any such specific job or, in the absence of such bid opening, until after the release of such information publicly or to the trade generally; or

F. Restrict production to certain types or sizes of pipe or restrict sales of pipe to any specified territory.

V

The consenting defendant is enjoined and restrained from:

A. Communicating with any other manufacturer of pipe for the purpose of attempting to coerce or force such manufacturer to restrict its sales of pipe to any territory or to restrict its production of pipe to certain sizes or types;

B. Communicating with any manufacturer or seller of pipe or with any company providing the services of lining or coating pipe, information about any specific job concerning bids, prices, terms or conditions applicable to the sale of pipe to third persons before the bid opening of any such specific job, or, in the absence of such bid opening, until after the release of such information publicly or to the trade generally.

VI

The consenting defendant is ordered and directed for a period of five years from the date of entry of this Final Judgment:

A. In connection with any sealed bid submitted by it to any Federal, State or local governmental authority, agency, or instrumentality for the sale of pipe, to supply, concurrently, or within a reasonable time thereafter, a written certification by an officer or employee of the consenting defendant regularly having the authority to determine the price for the type of bid involved,

in substantially the form of Appendix A hereto or containing the substance thereof;

B. In connection with any formal written quotation for the sale of pipe in excess of $25,000 to annex to such written quotation or include therein a written certification by an officer or employee of the consenting defendant regularly having the authority to determine the price for the type of quotation involved, in substantially the form of Appendix B hereto or containing the substance thereof;

C. To certify in writing through one of its officers or an employee of the consenting defendant regularly having the authority to determine published prices, at the time of every generally published revision of its published prices, terms or conditions of sale of pipe, that the decision to make such change was independently arrived at by the consenting defendant and not as the result of any agreement or understanding with any competitor, and further to retain in its files the aforesaid certifications for a period of five years from the date thereof, which certifications shall be made available to plaintiff for inspection upon reasonable written demand.

VII

Nothing contained in this Final Judgment shall be deemed to prohibit the consenting defendant from:

A. Communicating to any other person, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the sale of pipe in connection with any proposed or actual bona fide purchase or sale or subcontract between them, or entering into or performing any such transaction.

B. Furnishing to distributors of its pipe suggested prices, terms or conditions relating to the resale of such pipe, or prescribing such prices, terms or conditions where it is otherwise lawful to do so;

C. Communicating to any other person providing the services of lining or coating pipe, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the lining or coating of pipe in connection with any proposed or actual bona fide transaction between them for the lining or for coating of pipe, or entering into or performing any such transaction; and

D. Communicating to any other person, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the sale of pipe in connection with any proposed or actual bona fide joint bid, quotation or joint venture by or between the consenting defendant and any other defendant in this action or any other person, where the job is of such size or nature, or performable at such time, that in good faith the consenting defendant believes that it is undesirable to handle the entire job alone and the transaction is denominated as or is known to the purchaser to be a joint bid, quotation or joint venture, or entering into or performing any such transaction.

VIII

The consenting defendant is ordered and directed within 60 days from the date of entry of this Final Judgment to furnish a copy of this Final Judgment to each of its officers, plant managers, sales managers and assistant sales managers in the Western Area who are directly involved in the production or sale of pipe, and to their successors within 30 days after hiring or ap-

pointment, and to retain in its files for a period of five years from the date of this Final Judgment a written statement signed within 60 days after receipt thereof by each such employee setting forth the date he received a copy of this Final Judgment, his title, his place of employment and the name of his immediate superior.

IX

For the purpose of determining or securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the consenting defendant made to its principal office, be permitted, subject to any legally recognized privilege:

A. Reasonable access, during office hours of the consenting defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the consenting defendant, relating to any matters contained in this Final Judgment; and

B. Subject to the reasonable convenience of the consenting defendant and without restraint or interference from it, to interview officers or employees of the consenting defendant, who may have counsel present, regarding any such matters.

Upon such written request the consenting defendant shall submit such reports in writing with respect to any of the matters contained in this Final Judgment as may

from time to time be requested for the enforcement of this Final Judgment.

No information obtained by the means provided in this Section IX shall be divulged by any representative of the Department of Justice to anyone other than a duly authorized representative of the executive branch of the plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

X

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions hereof for the enforcement of compliance herewith and for the punishment of violations hereof.

Dated: May 23, 1968.

/s/ Martin Pence,
United States District Judge

APPENDIX A

By submitting this bid the undersigned hereby certifies that said bid has not been made or prepared in collusion with any other manufacturer of pipe and that the prices, terms or conditions applicable to the sale thereof have not been communicated by or on behalf of the bidder to any such manufacturer and will not be so communicated to any such manufacturer prior to the official opening of said bid, in violation of any decree entered against bidder by the United States District Court for the Central District of California which may be applicable to said bid.

Dated:

.....

Signature of Officer or Employee of the Corporation

APPENDIX B

By issuing this quotation or any changes thereof, the undersigned certifies that this quotation and any such changes have not been made or prepared in collusion with any other manufacturer of pipe in violation of any decree entered against seller by the United States District Court for the Central District of California which may be applicable to said quotation.

Dated:

.....

Signature of Officer or Employee of the Corporation

Filed May 24, 1968.
[Endorsement omitted in printing]

Entered May 27, 1968.
[Endorsement omitted in printing]
[Certification omitted in printing]

Final Judgment Against American Pipe and Construction Co.

United States District Court, Central District of California.

United States of America, Plaintiff, vs. United Concrete Pipe Corp.; American Pipe and Construction Co.; Kaiser Steel Corporation; and United States Steel Corporation, Defendants. Civil No. 64-834-MP.

Plaintiff, United States of America, having filed its complaint herein on June 23, 1964, its first amended complaint on October 28, 1964 and its second amended complaint on December 2, 1965, and the consenting defendant, American Pipe and Construction Co. having appeared by its attorney and having filed its answer to such complaint denying the substantive allegations thereof; and plaintiff and consenting defendant, by their respective attorneys, having severally consented to the making and entry of this Final Judgment pursuant to a stipulation entered into on April 23, 1968, without trial or adjudication of or finding on any issue of fact or law herein, and without this Final Judgment constituting any evidence or admission by any party to said stipulation with respect to any such issue, and the Court having considered the matter and being duly advised,

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties as aforesaid,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I

This Court has jurisdiction of the subject matter hereof and of the party consenting hereto. The second amended complaint herein having presented more than one claim for relief and dismissal being sought as to Counts I and II, based on a partial price adjustment, the Court hereby determines that there is no just reason for delay and directs entry of this Final Judgment as to the claim made in Count III.

The second amended complaint in Count III states a claim upon which relief may be granted under Section 1 of the Act of Congress of July 2, 1890 entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

As used in this Final Judgment:

A. "pipe" means "steel large diameter pressure pipe," as hereinafter defined, or "concrete large diameter pressure pipe," as hereinafter defined, which is sold and/or manufactured, or offered for sale, by the consenting defendant within the "Western Area," as hereinafter defined, for the conveyance of water or sewage on jobs where the specifications permit the use of either concrete large diameter pressure pipe or steel large diameter pressure pipe;

B. "steel large diameter pressure pipe" means heavy walled welded steel pipe which is manufactured in diameters of over 24 inches and sold for the conveyance of water or sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch;

C. "concrete large diameter pressure pipe" means concrete pressure pipe, which ordinarily utilizes steel sheets or skelp in its manufacture, in diameters over 24 inches, sold for the conveyance of water and sewage under internal presures exceeding 115 feet of head or 50 pounds per square inch;

D. "Western Area" means California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii; and

E. "person" means an individual, partnership, firm, association, corporation or other legal or business entity.

III

The provisions of this Final Judgment applicable to the consenting defendant shall also apply to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with the consenting defendant who shall have received actual notice of this Final Judgment by personal service or otherwise, but shall not apply to transactions solely between the consenting defendant and its officers, directors or employees when acting in such capacity, or between the consenting defendant and any of its subsidiaries. This Final Judgment shall not apply to conduct outside of the United States unless such conduct substantially affects the foreign or domestic commerce of the United States, but shall apply to sales by the consenting defendant to, or for the known use of, the plaintiff or any instrumentality or agency thereof.

IV

The consenting defendant is enjoined and restrained from directly or indirectly in any manner entering into,

adhering to, or claiming any right under, any contract, agreement, arrangement, understanding, plan or program with any other manufacturer or seller of pipe, or with any association of said manufacturers, or with any company providing the services of lining or coating of pipe, in relation to pipe, to:

A. Fix or adopt prices, terms or conditions of sale;

B. Maintain or adhere to agreed upon prices;

C. Submit noncompetitive, collusive or rigged bids or quotations to any customer;

D. Allocate or divide orders, territories or customers;

E. Communicate with any manufacturer or seller of pipe or with any company providing the services of lining or coating pipe, information about any specific job concerning bids, prices, terms or conditions applicable to the sale of pipe to third persons before the bid opening of any such specific job or, in the absence of such bid opening, until after the release of such information publicly or to the trade generally; or

F. Restrict production to certain types or sizes of pipe or restrict sales of pipe to any specified territory.

V

The consenting defendant is enjoined and restrained from:

A. Communicating with any other manufacturer of pipe for the purpose of attempting to coerce or force such manufacturer to restrict its sales of pipe to any territory or to restrict its production of pipe to certain sizes or types;

B. Communicating with any manufacturer or seller of pipe or with any company providing the services of

lining or coating pipe, information about any specific job concerning bids, prices, terms or conditions applicable to the sale of pipe to third persons before the bid opening of any such specific job, or, in the absence of such bid opening, until after the release of such information publicly or to the trade generally.

VI

The consenting defendant is ordered and directed for a period of five years from the date of entry of this Final Judgment:

A. In connection with any sealed bid submitted by it to any Federal, State or local governmental authority, agency, or instrumentality for the sale of pipe, to supply, concurrently or within a reasonable time thereafter, a written certification by an officer or employee of the consenting defendant regularly having the authority to determine the price for the type of bid involved, in substantially the form of Appendix A hereto or containing the substance thereof;

B. In connection with any formal written quotation for the sale of pipe in excess of $25,000 to annex to such written quotation or include therein a written certification by an officer or employee of the consenting defendant regularly having the authority to determine the price for the type of quotation involved, in substantially the form of Appendix B hereto or containing the substance thereof;

C. To certify in writing through one of its officers or an employee of the consenting defendant regularly having the authority to determine published prices, at the time of every generally published revision of its published prices, terms or conditions of sale of pipe, that the decision to make such change was independ-

ently arrived at by the consenting defendant and not as the result of any agreement or understanding with any competitor, and further to retain in its files the aforesaid certifications for a period of five years from the date thereof, which certifications shall be made available to plaintiff for inspection upon reasonable written demand.

VII

Nothing contained in this Final Judgment shall be deemed to prohibit the consenting defendant from:

A. Communicating to any other person, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the sale of pipe in connection with any proposed or actual bona fide purchase or sale or subcontract between them, or entering into or performing any such transaction;

B. Furnishing to distributors of its pipe suggested prices, terms or conditions relating to the resale of such pipe, or prescribing such prices, terms or conditions where it is otherwise lawful to do so;

C. Communicating to any other person providing the services of lining or coating pipe, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the lining or coating of pipe in connection with any proposed or actual bona fide transaction between them for the lining or for coating of pipe, or entering into or performing any such transaction; and

D. Communicating to any other person, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the sale of pipe in connection with any proposed or

actual bona fide joint bid, quotation or joint venture by or between the consenting defendant and any other defendant in this action or any other person, where the job is of such size or nature, or performable at such time, that in good faith the consenting defendant believes that it is undesirable to handle the entire job alone and the transaction is denominated as or is known to the purchaser to be a joint bid, quotation or joint venture, or entering into or performing any such transaction.

VIII

The consenting defendant is ordered and directed within 60 days from the date of entry of this Final Judgment to furnish a copy of this Final Judgment to each of its officers, plant managers, sales managers and assistant sales managers in the Western Area who are directly involved in the production or sale of pipe, and to their successors within 30 days after hiring or appointment, and to retain in its files for a period of five years from the date of this Final Judgment a written statement signed within 60 days after receipt thereof by each such employee setting forth the date he received a copy of this Final Judgment, his title, his place of employment and the name of his immediate superior.

IX

For the purpose of determining or securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attor-

ney General in charge of the Antitrust Division, and on reasonable notice to the consenting defendant made to its principal office, be permitted, subject to any legally recognized privilege:

A. Reasonable access, during office hours of the consenting defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of such consenting defendant, relating to any matters contained in this Final Judgment; and

B. Subject to the reasonable convenience of the consenting defendant and without restraint or interference from it, to interview officers or employees of the consenting defendant, who may have counsel present, regarding any such matters.

Upon such written request the consenting defendant shall submit such reports in writing with respect to any of the matters contained in this Final Judgment as may from time to time be requested for the enforcement of this Final Judgment.

No information obtained by the means provided in this Section IX shall be divulged by any representative of the Department of Justice to anyone other than a duly authorized representative of the executive branch of the plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

X

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions hereof, for the enforcement of compliance herewith and for the punishment of violations hereof.

Dated: May 22, 1968.

/s/ Martin Pence
United States District Judge

[Appendices A and B omitted in printing. See A 292-93, *supra.*]
Filed May 24, 1968.

[Endorsement omitted in printing]
Entered May 27, 1968.
[Endorsement omitted in printing]

Final Judgment Against American Pipe and Construction Co.

United States District Court, Central District of California.

United States of America, Plaintiff, vs. U.S. Industries, Inc.; Smith-Scott Co., Inc.; United States Steel Corporation; United Concrete Pipe Corp.; and American Pipe and Construction Co., Defendants. Civil No. 64-835-MP.

Plaintiff, United States of America, having filed its complaint herein on June 23, 1964, its first amended complaint on October 28, 1964 and its second amended complaint on December 2, 1965, and the consenting defendant American Pipe and Construction Co., having appeared by its attorney and having filed its answer to such complaint denying the substantive allegations thereof; and plaintiff and consenting defendant, by their respective attorneys, having severally consented to the making and entry of this Final Judgment pursuant to a stipulation entered into on April 23, 1968, without trial or adjudication of or finding on any issue of fact or law herein, and without this Final Judgment constituting any evidence or admission by any party to said stipulation with respect to any such issue, and the Court having considered the matter and being duly advised,

NOW, THEREFORE, before the taking of any testimony and without trial or adjudication of any issue of fact or law herein, and upon the consent of the parties as aforesaid,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

I

This Court has jurisdiction of the subject matter hereof and of each party consenting hereto. The second

amended complaint herein having presented more than one claim for relief and dismissal being sought as to Counts I and II, based on a partial price adjustment, the Court hereby determines that there is no just reason for delay and directs entry of this Final Judgment as to the claim made in Count III.

The second amended complaint in Count III states a claim upon which relief may be granted under Section 1 of the Act of Congress of July 2, 1890 entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

II

As used in this Final Judgment:

A. "Pipe" means "steel small diameter pressure pipe," as hereinafter defined, or "concrete small diameter pressure pipe," as hereinafter defined, which is sold and/or manufactured, or offered for sale, by the consenting defendant within the "Western Area," as hereinafter defined, for the conveyance of water or sewage on jobs where the specifications permit the use of either concrete small diameter pressure pipe or steel small diameter pressure pipe.

B. "steel small diameter pressure pipe" means thin walled welded steel pipe, manufactured from steel plate in diameters of 12 inches to 48 inches and sold for the conveyance of water and sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch.

C. "concrete small diameter pressure pipe" means concrete cylinder pipe, which utilizes steel sheets or skelp in its manufacture, in diameters from 12 inches to 48 inches and sold for the conveyance of water or sewage

under internal pressure exceeding 115 feet of head or 59 pounds per square inch.

D. "Western Area" means California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii; and

E. "person" means an individual, partnership, firm, association, corporation or other legal or business entity.

III

The provisions of this Final Judgment applicable to the consenting defendant shall also apply to each of its subsidiaries, successors, assigns, officers, directors, agents and employees, and to all other persons in active concert or participation with the consenting defendant who shall have received actual notice of this Final Judgment by personal service or otherwise, but shall not apply to transactions solely between the consenting defendant and its officers, directors or employees when acting in such capacity, or between the consenting defendant and any of its subsidiaries. This Final Judgment shall not apply to conduct outside of the United States unless such conduct substantially affects the foreign or domestic commerce of the United States, but shall apply to sales by the consenting defendant to, or for the known use of, the plaintiff or any instrumentality or agency thereof.

IV

The consenting defendant is enjoined and restrained from directly or indirectly in any manner entering into, adhering to, or claiming any right under, any contract, agreement, arrangement, understanding, plan or program with any other manufacturer or seller of pipe, or with any association of said manufacturers, or with any

company providing the services of lining or coating of pipe, in relation to pipe, to:

A. Fix or adopt prices, terms or conditions of sale;

B. Maintain or adhere to agreed upon prices;

C. Submit noncompetitive, collusive or rigged bids or quotations to any customer;

D. Allocate or divide orders, territories or customers;

E. Communicate with any manufacturer or seller of pipe or with any company providing the services of lining or coating pipe, information about any specific job concerning bids, prices, terms or conditions applicable to the sale of pipe to third persons before the bid opening of any such specific job or, in the absence of such bid opening, until after the release of such information publicly or to the trade generally; or

F. Restrict production to certain types or sizes of pipe or restrict sales of pipe to any specified territory.

V

The consenting defendant is enjoined and restrained from:

A. Communicating with any other manufacturer of pipe for the purpose of attempting to coerce or force such manufacturer to restrict its sale of pipe to any territory or to restrict its production of pipe to certain sizes or types;

B. Communicating with any manufacturer or seller of pipe or with any company providing the services of lining or coating pipe, information about any specific job concerning bids, prices, terms or conditions applicable to the sale of pipe to third persons before the bid

opening of any such specific job, or, in the absence of such bid opening, until after the release of such information publicly or to the trade generally.

VI

The consenting defendant is ordered and directed for a period of five years from the date of entry of this Final Judgment:

A. In connection with any sealed bid submitted by it to any Federal, State or local governmental authority, agency, or instrumentality for the sale of pipe, to supply, concurrently or within a reasonable time thereafter, a written certification by an officer or employee of such consenting defendant regularly having the authority to determine the price for the type of bid involved, in substantially the form of Appendix A hereto or containing the substance thereof;

B. In connection with any formal written quotation for the sale of pipe in excess of $25,000 to annex to such written quotation or include therein a written certification by an officer or employee of the consenting defendant regularly having the authority to determine the price for the type of quotation involved, in substantially the form of Appendix B hereto or containing the substance thereof;

C. To certify in writing through one of its officers or an employee of the consenting defendant regularly having the authority to determine published prices, at the time of every generally published revision of its published prices, terms or conditions of sale of pipe, that the decision to make such change was independently arrived at by the consenting defendant and not as the result of any agreement or understanding with any competitor, and further to retain in its files the

aforesaid certifications for a period of five years from the date thereof, which certifications shall be made available to plaintiff for inspection upon reasonable written demand.

VII

Nothing contained in this Final Judgment shall be deemed to prohibit the consenting defendant from:

A. Communicating to any other person, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the sale of pipe in connection with any proposed or actual bona fide purchase or sale or subcontract between them, or entering into or performing any such transaction;

B. Furnishing to distributors of its pipe suggested prices, terms or conditions relating to the resale of such pipe, or prescribing such prices, terms or conditions where it is otherwise lawful to do so;

C. Communicating to any other person providing the services of lining or coating pipe, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the lining or coating of pipe in connection with any proposed or actual bona fide transaction between them for the lining or for coating of pipe, or entering into or performing any such transaction; and

D. Communicating to any other person, including any of the defendants in this action, information concerning bids, prices, terms or conditions applicable to the sale of pipe in connection with any proposed or actual bona fide joint bid, quotation or joint venture by or between the consenting defendant and any other defendant in this action or any other person, where the job is of such size or nature, or performable at

such time, that in good faith the consenting defendant believes that it is undesirable to handle the entire job alone and the transaction is denominated as or is known to the purchaser to be a joint bid, quotation or joint venture, or entering into or performing any such transaction.

VIII

The consenting defendant is ordered and directed within 60 days from the date of entry of this Final Judgment to furnish a copy of this Final Judgment to each of its officers, plant managers, sales managers and assistant sales managers in the Western Area who are directly involved in the production or sale of pipe, and to their successors within 30 days after hiring or appointment, and to retain in its files for a period of five years from the date of this Final Judgment a written statement signed within 60 days after receipt thereof by each such employee setting forth the date he received a copy of this Final Judgment, his title, his place of employment and the name of his immediate superior.

IX

For the purpose of determining or securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to the consenting defendant made to its principal office, be permitted, subject to any legally recognized privilege:

A. Reasonable access, during office hours of the consenting defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of the

consenting defendant, relating to any matters contained in this Final Judgment; and

B. Subject to the reasonable convenience of the consenting defendant and without restraint or interference from it, to interview officers or employees of the consenting defendant, who may have counsel present, regarding any such matters.

Upon such written request the consenting defendant shall submit such reports in writing with respect to any of the matters contained in this Final Judgment as may from time to time be requested for the enforcement of this Final Judgment.

No information obtained by the means provided in this Section IX shall be divulged by any representative of the Department of Justice to anyone other than a duly authorized representative of the executive branch of the plaintiff except in the course of legal proceedings to which the United States is a party for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

X

Jurisdiction is retained by this Court for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions hereof, for the enforcement of compliance herewith and for the punishment of violations hereof.

Dated: May 22, 1968.

/s/ Martin Pence
United States District Judge

APPENDIX A

By submitting this bid the undersigned hereby certifies that said bid has not been made or prepared in collusion with any other manufacturer of pipe and that the prices, terms or conditions applicable to the sale thereof have not been communicated by or on behalf of the bidder to any such manufacturer and will not be so communicated to any such manufacturer prior to the official opening of said bid, in violation of any decree entered against bidder by the United States District Court for the Central District of California which may be applicable to said bid.

Dated:

.....

Signature of Officer or Employee of the Corporation

APPENDIX B

By issuing this quotation or any changes thereof, the undersigned certifies that this quotation and any such changes have not been made or prepared in collusion with any other manufacturer of pipe in violation of any decree entered against seller by the United States District Court for the Central District of California which may be applicable to said quotation.

Dated:

.....

Signature of Officer or Employee of the Corporation

Filed May 24, 1968.
[Endorsement omitted in printing]
Entered May 27, 1968.
[Endorsement omitted in printing]

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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-1195

AMERICAN PIPE AND CONSTRUCTION CO., *et al.*,
Petitioners,

vs.

STATE OF UTAH, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

APPENDIX.

In Two Volumes.

Volume II.

(Pages 313 to 535).

Complaint.

(Jury Demanded).

United States District Court, District of Utah, Central Division.

State of Utah, on behalf of itself and all others similarly situated, Plaintiffs, vs. American Pipe and Construction Company; United Concrete Pipe Corporation; Utah Concrete Pipe Company; W. R. White Company; United States Steel Corporation; Kaiser Steel Corporation; Smith-Scott, Inc.; U.S. Industries, Inc., Defendants. Civil No. C-177-69.

The State of Utah, plaintiff by its attorneys, acting under the direction of the Attorney General of Utah, brings this civil action on its own behalf and on behalf of all other public bodies, agencies, political subdivisions and districts of the State of Utah similarly situated and on behalf of other states and their public bodies, agencies, and subdivisions for treble the amount of damages suffered by it and by each other member of the class due to the defendants' violations of the antitrust laws of the United States. Plaintiff demands a trial by jury and alleges as follows:

FIRST CAUSE OF ACTION

I

CLASS ACTION

1. Plaintiff brings this action for itself separately and as a representative of a class on behalf of all of the members thereof. The class represented by plaintiff is composed of those public bodies and agencies of state and local government in the State of Utah who are end users of pipe acquired from defendants, co-conspirators and others.

2. The class also includes all other states in the Western Area, as hereinafter defined, which have not previously filed a similar action including the states of Wyoming, Nevada and Idaho and includes those public bodies and agencies of state and local government in said states who are end users of pipe acquired from defendants, co-conspirators and others.

3. The class is so numerous that joinder of all members is impractical and there are questions of law or fact common to the class. The claims of plaintiff as representative are typical of the claims of the class, and plaintiff as representative acting through its Attorney General, will fairly and adequately protect the interests of the class.

II

JURISDICTION AND VENUE

4. This complaint is filed and the jurisdiction of this Court is invoked under the provisions of Section 4 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731, as amended (15 U.S.C. § 15), entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, to recover damages for injuries to its business or property which the State of Utah and each member of the class has sustained due to violations by the defendants of Section 1 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended (15 U.S.C. § 1), entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act.

5. Each corporate defendant maintains an office, transacts business, is found, resides, or has an agent

in the District of Utah, and each of said corporate defendants is within the jurisdiction of this Court for the purpose of service.

6. The interstate trade and commerce described herein is carried on in part within the District of Utah. Many of the unlawful acts done pursuant to the combination and conspiracy hereafter alleged have been performed within the District of Utah.

III
DEFINITIONS

7. As used herein the term:

(a) "Steel small diameter pressure pipe" (herein referred to as "steel SDP pipe") means thin-walled welded steel pipe which is manufactured in diameters of 4 inches to 48 inches and sold for the conveyance of water or sewage under internal pressure exceeding 115 feet of head or 50 pounds per square inch.

(b) "Alternate small diameter pressure pipe" (herein referred to as "alternate SDP pipe") means small diameter pressure pipe (herein referred to as "SDP pipe") which is manufactured and sold or offered for sale on jobs where the specifications permit the use of either concrete SDP pipe or steel SDP pipe.

(c) "Steel large diameter pressure pipe" (herein referred to as "steel LDP pipe") means heavy-walled welded steel pipe which is manufactured in diameters of over 24 inches and sold for the conveyance of water and sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch.

(d) "Alternate large diameter pressure pipe" (herein referred to as "alternate LDP pipe") refers to large diameter pressure pipe (herein referred to as "LDP

pipe") which is manufactured and sold or offered for sale on jobs where the specifications permit the use of either concrete LDP pipe or steel LDP pipe. The specifications for alternate LDP pipe customarily require that the pipe be lined and/or coated with concrete.

(e) "Concrete pipe" means pipe constructed of concrete either with or without metal components as hereinafter defined to convey water and sewage and includes both pressure and non-pressure pipe.

(f) "Metal components" refers to the steel plates, sheets, skelp, rods, wire and/or mesh used in the manufacture of concrete pipe and to the steel plate and sheets used in the manufacture of steel SDP and LDP pipe.

(g) "Western Area" refers to the states of California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii.

(h) "End users" means consumers who purchase and install or have installed any of the types of pipe above defined in systems primarily for the conveyance of drinking water and sewage under pressure and for drainage, irrigation, flood control and similar purposes.

IV
DESCRIPTION OF THE PARTIES

8. Plaintiff, the State of Utah, through its departments, divisions, agencies, institutions, universities and colleges, is an end user of the types of pipe herein defined acquired from defendants, co-conspirators and others directly or indirectly.

9. The class represented by plaintiff is composed of all of the political subdivisions of the State, including counties, cities, and municipalities. It also includes districts comprising public entities organized under the laws of Utah, including, but not limited to irrigation, flood control, sewer and water districts. Many of these political subdivisions and districts are end users of the pipe herein defined acquired from defendants, co-conspirators and others directly or indirectly.

10. The class also includes all other states in the Western Area which have not previously filed a similar action including the states of Wyoming, Nevada and Idaho and their departments, divisions, agencies, institutions, universities and colleges. The class includes all of the political subdivisions of said states, including counties, cities, and municipalities. It further includes districts comprising public entities organized under the laws of said states. Said states and many of their public bodies, agencies, political subdivisions, and districts are end users of the pipe herein defined acquired from defendants, co-conspirators and others directly or indirectly.

11. The State of Utah and its political subdivisions and districts and the other states in the Western Area including the states of Wyoming, Nevada and Idaho, together with their political subdivisions and districts are a class of persons herein called "public and users."

12. The State of Utah and the other public end users own, construct, alter, maintain and operate water and sewage projects, highways and other facilities for

the rendering of public services and, by means of awarding public construction contracts, acquire materials and services, including pipe as defined herein.

13. Defendants:

(a) Defendant American Pipe and Construction Company (hereinafter called "American") is a corporation existing under the laws of the State of California with its principal place of business in Monterey Park, California. American is engaged, among other things, in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(b) Defendant United Concrete Pipe Corporation (hereinafter called "United") is a corporation organized and existing under the laws of the State of California with its principal place of business in Baldwin Park, California. United is engaged, among other things, in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(c) Defendant Utah Concrete Pipe Company (hereinafter called "Utah Pipe") is a corporation organized and existing under the laws of the State of Utah with its principal place of business in Ogden, Utah. Utah Pipe is engaged, among other things, in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(d) Defendant W. R. White Company (hereinafter called "White") is a corporation organized and existing under the laws of the State of Utah with its principal

place of business in Ogden, Utah. White is engaged, among other things, in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(e) Defendant United States Steel Corporation (hereinafter called "U.S. Steel") is a New Jersey corporation which in 1948 acquired the Consolidated Western Steel Corporation, which during the period of the conspiracy herein alleged it operated as a division of U.S. Steel. During this time U.S. Steel, among other things, engaged in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(f) Defendant Kaiser Steel Corporation (hereinafter called "Kaiser") is a corporation organized and existing under the laws of the State of Nevada with its principal place of business in Oakland, California. Kaiser was, during the period of time covered by this complaint, engaged, among other things, in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(g) Defendant Smith-Scott, Inc. (hereinafter called "Smith-Scott") is a corporation organized and existing under the laws of the State of California, with its principal place of business in Riverside, California. Smith-Scott, among other things, is engaged in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(h) Defendant U.S. Industries, Inc. (hereinafter called "U.S.I.") is a Delaware corporation which in

1955 purchased the assets of Southern Pipe and Casing, which during the period of the conspiracy herein alleged, it operated as the Tubular Products Division of U.S.I. with offices in Azusa, California. During the period of the conspiracy herein alleged, U.S.I., through its Tubular Products Division, engaged in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

14. Martin-Marietta Corporation (hereinafter called "Martin-Marietta") and various other corporations, partnerships and individuals engaged in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area, are named as co-conspirators herein. Each of them participated with defendants and with other co-conspirators in the offense charged and performed acts and made statements in furtherance thereof.

V

NATURE OF TRADE AND COMMERCE

15. The defendants Smith-Scott, U.S.I. and U.S. Steel are the principal manufacturers of steel SDP pipe in the Western Area. Total sales of steel SDP pipe by these defendants during the period May, 1958 through January, 1962 averaged at least $13,500,000 annually.

16. Defendants American, Smith-Scott, U.S.I., U.S. Steel and United are the principal manufacturers of alternate SDP pipe in the Western Area. Total sales of alternate SDP pipe by these defendants during the period 1957 through 1961 inclusive averaged approximately $18,000,000 annually.

17. The defendants American, Kaiser, United and U.S. Steel are the principal manufacturers of alternate LDP pipe in the Western Area. Total sales of alternate LDP pipe by these defendants during the period 1958 through 1961 inclusive averaged at least $15,000,000 annually.

18. The defendants Kaiser and U.S. Steel are the principal manufacturers of steel LDP pipe in the Western Area. Total sales of steel LDP pipe by these defendants during the period 1958 through 1961 inclusive, averaged at least $7,000,000 annually.

19. The defendants American and United are the principal manufacturers of concrete pipe in the Western Area. Total sales of concrete pipe by these defendants during the period 1958 through 1961 inclusive averaged at least $41,500,000 annually.

20. The defendants Utah Pipe and White are manufacturers and vendors of some of the types of concrete pipe defined in this complaint. During the period of the conspiracy alleged herein said defendants were significant market factors in at least Utah, a part of the Western Area.

21. The co-conspirator Martin-Marietta is a manufacturer and vendor of concrete pipe of the types defined in this complaint. During the period of the conspiracy alleged herein Martin-Marietta was a significant market factor in the Western Area.

22. The construction of systems utilizing the types of pipe herein defined is customarily contracted for by the public end user with general contractors on the basis of competitive bids. Where it is appropriate and desired by the end user, the end user drafts or has drafted specifications allowing the use of steel LDP

or SDP, concrete or either steel or concrete LDP or SDP pipe in the alternative.

23. Prior to submitting bids to the end user, the general contractor usually solicits quotations from pipe manufacturers for the purchase price of the pipe delivered to the site where it is to be installed. The award winning contractor usually contracts for the purchase of the pipe from the low quoting pipe manufacturer at the price quoted by the latter. Occasionally the end user contracts directly with the pipe manufacturer for the purchase of said pipe and usually on the basis of competitive bidding.

24. The specifications for alternate LDP pipe customarily require that the pipe be lined and/or coated with concrete. When the steel LDP pipe manufacturers plan to submit bids or quotations on an alternate LDP pipe job, they in turn solicit quotations or bids from the concrete LDP pipe manufacturers for the performance of this service. The cost of this service is then incorporated in the quotation or bid submitted to the general contractors or end users by the steel LDP pipe manufacturer.

25. Because of the relatively limited number of manufacturers of the types of pipe defined in this complaint, general contractors and end users frequently solicit quotations and bids from manufacturers outside the state where said pipe is to be installed. Manufacturers of said pipe usually manufacture the pipe for a particular job only after receiving an order for it. Said manufacturers customarily identify each section of pipe so as to designate its position in the pipeline and deliver or have delivered said pipe directly to the trench site or as near as possible to the place where it will be installed. During the period of the conspiracies

herein alleged, the defendants herein have manufactured substantial quantities of the types of pipe herein defined at their plants within the Western Area and elsewhere, and in response to solicitations calling for bids on the types of pipe herein defined have sold, shipped and delivered said pipe to job sites outside the state where it was manufactured. Numerous of these job sites were and are situated within the State of Utah, thus the types of pipe herein defined move in a continuous and uninterrupted flow from the place of manufacture, including the plants of the defendants herein to points of installation outside the state where said pipe was manufactured.

26. Steel SDP pipe and steel LDP pipe are fabricated largely from steel sheet and plate. Most concrete pipe is manufactured with metal components to strengthen the pipe, and particularly with respect to concrete pressure pipe to make it water-tight. The defendant manufacturers purchase or produce said steel plate or metal components in anticipation of orders for or to enable them to fill existing orders for the types of pipe herein defined, except non-reinforcd concrete pipe. Substantial quantities of the steel plate or metal components which the defendants use in manufacturing the types of pipe herein defined, except non-reinforced concrete pipe, are produced outside the state where said pipe is manufactured. The movement in interstate commerce of the steel plate and metal components is necessary to the manufacture and sale of said pipe by the defendants in the Western Area, and the defendants and co-conspirators are conduits through which said steel plate and metal components flow in a continuous and uninterrupted stream in interstate commerce from the place where said steel plate or metal

components are produced to the place within the Western Area where they are fabricated into the types of pipe herein defined and on to the installation site.

27. Any restraint upon free competition in the production or sale of the types of pipe herein defined in the Western Area necessarily and directly affects the interstate flow of said pipe and the interstate flow of the sheet and steel plate and the metal components utilized in the manufacture of all of said types of pipe, except non-reinforced concrete pipe.

VI
OFFENSES CHARGED

28. Beginning prior to the year 1954 in the case of concrete pipe and prior to the year 1958 in the case of steel pipe and probably as far back as 1946 in both cases and continuing so far as plaintiff and the other public end users know to the date of the filing of this complaint, the defendants and co-conspirators engaged in an unlawful combination and conspiracy to eliminate competition and stabilize and maintain the prices of the herein defined types of pipe, thereby restraining the hereinabove described interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. § 1, commonly known as the Sherman Act.

29. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among and between the defendants

and co-conspirators, the substantial terms of which were:

(a) To submit collusive and rigged bids and quotations in response to solicitations calling for bids and quotes for the herein defined types of pipe.

(b) To allocate and divide orders for the purchase of the herein defined types of pipe among themselves.

(c) To refrain from competing in the manufacture of certain sizes and types of pipe in certain areas where those sizes and types were manufactured by another defendant or co-conspirator.

30. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which, as hereinabove alleged, they combined and conspired to do, including, but not limited to the following:

(a) Defendants and co-conspirators held periodic meetings to tally past orders and to discuss prospective orders for the purpose of allocating prospective orders among themselves according to agreed upon percentages.

(b) At such meetings and in subsequent communications by telephone and other interstate communication media, the defendants and co-conspirators agreed between and among themselves as to which manufacturers would submit the low bid and what that bid would be and which manufacturers would refrain from bidding or would submit higher complementary bids not intended to win awards and what those bids would be.

(c) At such meetings and at subsequent meetings, defendants and co-conspirators would agree in certain instances as to the types and sizes of pipe each would manufacture and market in certain geographical areas included in the Western Area.

VII

EFFECTS OF THE CONSPIRACY

31. The aforesaid combination and conspiracy had, among others, the following effects:

(a) Competition between and among defendants and co-conspirators has been restricted and suppressed.

(b) General contractors and end users were deprived of the right to receive competitive bids and quotes for the types of pipe herein defined and were deceived into believing that collusive and non-competitive bids and quotes were competitive.

(c) Public end users and others engaged in the conveyance and distribution of water and sewage have been denied the right to receive competitive sealed bids as required by law or practice or have been denied a competitive market in connection with their purchases and have been forced to pay high, artificially fixed prices for the type of pipe herein defined.

(d) The cost of the types of pipe herein defined has been arbitrarily increased, fixed and maintained.

(e) The business and property of the plaintiff and the other public end users, as intended by the defendants and co-conspirators, were injured in that they were compelled to pay higher prices for the types of pipe herein defined than they would have had to pay had it not been for the aforementioned combination and conspiracy.

VIII
TOLLING OF THE STATUTE OF LIMITATIONS

32. Plaintiff and the other public end users did not discover said combination and conspiracy until the year 1968. Plaintiff and the other public end users had no knowledge of the said combination and conspiracy or of any facts which might have led to the discovery thereof until after March 10, 1964, when a United States Grand Jury sitting in the Southern District of California, Central Division, returned indictments numbered 33338-42 inclusive, setting out in large part the combinations and conspiracies herein alleged. Plaintiff and the other public end users could not have uncovered the conspiracy at an earlier date by the exercise of due diligence inasmuch as the unlawful conspiracy had been fraudulently concealed by defendants and co-conspirators through their adoption of elaborate schemes for submitting sham and collusive bids which misrepresented the independence and competitiveness thereof and their resort to secrecy to avoid detection as hereinabove alleged.

33. Since March 10, 1964 and continuing through and one year from the date of the entering of a Consent Decree against the last remaining defendant in a government case, said Consent Decree having been entered on May 24, 1968, the running of the Statute of limitations has been suspended by reason of 15 U.S.C. § 16 (b), commonly referred to as § 5 (b) of the Clayton Act because of the pendency of actions instituted by the United States of America. This complaint is based in part upon matters alleged in those government actions.

34. The defendants Utah Pipe and White were neither defendants in the government actions nor named co-conspirators. As to those defendants, plaintiff and the other public end users had no knowledge of the said combination and conspiracy or any facts which might have led to the discovery thereof prior to at least the year 1968. Plaintiff and the other public end users could not have uncovered the conspiracy as to these defendants at an earlier date by the exercise of due diligence inasmuch as said defendants and other co-conspirators acted together and individually by agreement to conceal the existence of said combination and conspiracy and the acts performed in furtherance thereof. Their adoption of schemes for submitting sham and collusive bids and quotations which misrepresented the independence and competitiveness thereof is but one manifestation of their resort to secrecy.

IX

INJURY TO PLAINTIFF AND MEMBERS OF THE CLASS

35. Since at least 1946 plaintiff and the other public end users have acquired substantial quantities of the types of pipe herein defined which have been manufactured by defendants, co-conspirators and others. In acquiring said pipe plaintiff and the other public end users have usually invited formal sealed competitive bids from manufacturers directly or from prime contractors, and they have generally accepted the price offered by the lowest responsible bidder.

36. When acquiring said pipe directly from manufacturers, plaintiff and the other public end users have been led and induced by the defendants and co-conspirators, as a result of the illegal combination and con-

spiracy alleged herein, to make contract awards at prices fixed by and influenced by said illegal combination and conspiracy, and plaintiff and the other public end users have been denied the benefit of free and unrestricted competition in their acquisition of said pipe. By the operation of defendants' and co-conspirators' agreements and concert of action herein alleged, plaintiff and the other public end users have been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

37. When acquiring said pipe through prime contractors, plaintiff and the other public end users have been forced to make contract awards on bids or quotes incorporating prices fixed by and influenced by the defendants' and co-conspirators' illegal combination and conspiracy, and plaintiff and the other public end users have been denied the benefit of free and unrestricted competition in their acquisition of said pipe. By the operation of defendants' and co-conspirators' agreements and concert of action herein alleged, the plaintiff and the other public end users have been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

38. As a result of the alleged illegal combination and conspiracy, plaintiff and the other public end users have been injured and financially damaged by the defendants in an amount which is presently undetermined. Plaintiff and the other public end users specifically reserve the right to determine the exact amount of their injury and upon such determination or at such other time as the court directs to amend this complaint and set forth in said amendment or whatever other means the court may direct, the exact amount of their injury.

X

ADDITIONAL CAUSES OF ACTION ALTERNATIVE TO THE ABOVE FIRST CAUSE OF ACTION

39. As additional causes of action alternative to the above first cause of action plaintiff alleges that commencing at least as early as the year 1954 and continuing until at least 1962, the exact dates being unknown to plaintiff, the defendants and co-conspirators engaged in a continuing course of conduct which consisted of a series of combinations, conspiracies and agreements in restraint of the aforesaid interstate trade and commerce in the types of pipe herein defined. These combinations, conspiracies and agreements are described in the following alternative causes of action. Plaintiff herein alleges and incorporates by reference in each of the alternative causes of action as fully as though there separately set out, Paragraphs I through V, Paragraph VII and Paragraph VIII.

XI

SECOND CAUSE OF ACTION

(Combination and Conspiracy Involving Steel Small Diameter Pressure Pipe)

40. Beginning at least as early as May, 1958 and continuing thereafter until at least January, 1962, the exact dates being unknown to plaintiff and the other public end users, the defendants U.S. Steel, U.S.I. and Smith-Scott and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinabove described interstate trade and commerce in steel SDP pipe in violation of Section 1 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as

amended, entitled "An Act to protect trade and commerce against restraints and monopolies," commonly known as the Sherman Act.

41. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among said defendants and co-conspirators, the substantial terms of which were:

(a) To submit collusive and rigged bids and quotations for the sale of steel SDP pipe; and

(b) To allocate and divide orders for the purchase of SDP pipe among themselves.

42. For the purpose of forming and effectuating and as a part of the aforesaid combination and conspiracy, said defendants did those things which, as hereinabove alleged, they combined and conspired to do, including, but not limited to the following things:

(a) Said Defendants and co-conspirators held periodic meetings to tally past orders and to discuss prospective orders for the purpose of allocating prospective orders among said defendants and co-conspirators.

(b) At such meetings and in subsequent telephone conversations said defendants and co-conspirators agreed between and among themselves as to which manufacturer would make the low bid, and what that bid would be, and which manufacturers would submit higher complementary bids not intended to win awards on such jobs.

43. The aforesaid combination and conspiracy in restraint of the interstate trade and commerce in the types of pipe covered by this paragraph of the complaint was carried out in the manner and with the effects described in Paragraphs VII and VIII.

44. Since at least 1946 plaintiff and the other public end users have acquired substantial quantities of the type of pipe covered in this paragraph of the complaint which have been manufactured by defendants, co-conspirators and others. In acquiring said pipe, plaintiff and the other public end users have usually invited formal sealed competitive bids from manufacturers directly or from prime contractors, and they have generally accepted the price offered by the lowest responsible bidder.

45. When acquiring said pipe directly from manfacturers plaintiff and the other public end users have been led and induced by the defendants and co-conspirators as a result of the illegal combination and conspiracy alleged herein, to make contract awards at prices fixed by and influenced by said illegal combination and conspiracy, and plaintiff and the other public end users have been denied the benefit of free and unrestricted competition in their acquisition of said pipe. By the operation of defendants' and co-conspirators' agreements and concert of action herein alleged, plaintiff and the other public end users have been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

46. When acquiring said pipe through prime contractors, plaintiff and the other public end users have been forced to make contract awards on bids or quotes incorporating prices fixed by and influenced by said defendants' and co-conspirators' illegal combination and conspiracy, and plaintiff and the other public end users have been denied the benefit of free and unrestricted competition in their acquisition of said pipe. By the operation of defendants' and co-conspirators' agreements and concert of action herein alleged, the plaintiff and

the other public end users have been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

47. As a result of the alleged illegal combination and conspiracy, plaintiff and the other public end users have been injured and financially damaged by the defendants in an amount which is presently undetermined. Plaintiff and the other public end users specifically reserve the right to determine the exact amount of their injury and upon such determination or at such other time as the court directs to amend this complaint and set forth in said amendment or whatever other means the court may direct, the exact amount of their injury.

XII

THIRD CAUSE OF ACTION

(Combination and Conspiracy Involving Alternate Small Diameter Pressure Pipe)

48. Beginning sometime prior to 1955 and continuing thereafter until at least January, 1962, the exact dates being unknown to plaintiff and the other public end users, the defendants U.S. Steel, Smith-Scott, U.S.I., American and United and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in alternate SDP pipe in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. § 1, commonly known as the Sherman Act.

49. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among said defendants and co-conspirators to allocate and divide alternate SDP pipe jobs

so that the manufacturers of steel SDP pipe considered as a group on the one hand and the manufacturers of concrete SDP pipe considered together on the other hand would each obtain an agreed upon percent of all alternate SDP pipe jobs.

50. For the purpose of forming and effectuating the aforesaid combination and conspiracy and as a part thereof, said defendants and co-conspirators did those things, which, as hereinbefore alleged, they combined and conspired to do, including, but not limited to the following:

(a) Tallies were maintained by representatives of each defendant for the purpose of keeping a record of whether a steel SDP pipe manufacturer or a concrete SDP pipe manufacturer obtained each job. Information needed for such tallies was often obtained at meetings or by telephone conversations between said defendants or co-conspirators.

51. Plaintiff here re-alleges as fully as though here set out Subparagraphs 43 through 47 of Paragraph XI.

XIII

FOURTH CAUSE OF ACTION

(Combination and Conspiracy Involving Alternate Large Diameter Pressure Pipe)

52. Beginning sometime prior to 1955 and continuing thereafter until at least August, 1962, the exact dates being unknown to plaintiff and the other public end users, the defendants American, Kaiser, United and U.S. Steel and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in alternate LDP pipe in violation of Section 1 of the

Act of Congress of July 2, 1890, as amended, 15 U.S.C. § 1, commonly known as the Sherman Act.

53. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among said defendants and co-conspirators to allocate and divide solicitations for alternate LDP pipe so that the manufacturers of steel LDP pipe would obtain approximately 50 percent of the orders resulting from said solicitations and the manufacturers of concrete LDP pipe would obtain approximately 50 percent of the orders resulting from said solicitations, the amount of business involved in the lining and coating of the steel LDP pipe by the concrete LDP pipe manufacturers being included in the share to be obtained by the concrete LDP pipe manufacturers.

54. For the purpose of forming and effectuating the aforesaid combination and conspiracy and as a part thereof, said defendants and co-conspirators did those things which, as hereinbefore alleged, they combined and conspired to do, including, but not limited to the following:

(a) Tallies were maintained by representatives of each defendant for the purpose of keeping a record of whether a steel LDP pipe manufacturer or a concrete LDP pipe manufacturer obtained each job. Information needed for such tallies was often obtained at meetings or by telephone conversations between said defendants or co-conspirators.

55. Plaintiff here re-alleges as fully as though here set out Subparagraphs 43 through 47 of Paragraph XI.

XIV

FIFTH CAUSE OF ACTION

(Combination and Conspiracy Involving Steel Large Diameter Pressure Pipe)

56. Beginning sometime prior to 1955 and continuing thereafter until at least August, 1962, the exact dates being unknown to plaintiff and the other public end users, the defendants Kaiser and U.S. Steel and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in steel LDP pipe in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. § 1, commonly known as the Sherman Act.

57. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among said defendants and co-conspirators, the substantial terms of which were:

(a) To submit collusive and rigged bids for the sale of steel LDP pipe; and

(b) To allocate and divide orders for the purchase of steel LDP pipe among themselves.

58. For the purpose of forming and effectuating the aforesaid combination and conspiracy and as a part thereof, said defendants and co-conspirators did those things which, as hereinbefore alleged, they combined and conspired to do, including, but not limited to the following things:

(a) Said defendants and co-conspirators held periodic meetings to tally orders and to discuss prospective orders for the purpose of allocating prospective orders among said defendants and co-conspirators.

(b) At such meetings and in subsequent telephone conversations said defendants and co-conspirators agreed between and among themselves as to which manufacturer would make the low bid, and what that bid would be, and which manufacturers would submit higher complementary bids not intended to win awards on such jobs.

59. Plaintiff here re-alleges as fully as though here set out Subparagraphs 43 through 47 of Paragraph XI.

XV

SIXTH CAUSE OF ACTION

(Combination and Conspiracy Involving Concrete Pipe)

60. Beginning in or prior to the year 1954 and continuing thereafter until at least August, 1962 and continuing so far as plaintiff and the other public end users know to the date of the filing of this complaint the defendants American, United, Utah Pipe and White and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in concrete pipe in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. § 1, commonly known as the Sherman Act.

61. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among said defendants and co-conspirators, the substantial terms of which were:

(a) To submit collusive and rigged bids for the sale of concrete pipe;

(b) To allocate and divide orders for the purchase of concrete pipe among themselves; and

(c) To refrain from competing in the manufacture of certain sizes and types of concrete pipe in certain areas where those sizes and types were manufactured by another defendant or co-conspirator.

62. For the purpose of forming and effectuating the aforesaid combination and conspiracy and as a part thereof, said defendants and co-conspirators did those things which, as hereinbefore alleged, they combined and conspired to do, including, among others, the following things:

(a) Said defendants and co-conspirators held periodic meetings to tally past orders and to discuss prospective orders for the purpose of allocating prospective orders among said defendants and co-conspirators.

(b) At such meetings and in subsequent telephone conversations defendants and co-conspirators agreed between and among themselves as to which manufacturer would make the low bid, and what that bid would be, and which manufacturers would submit higher complementary bids not intended to win awards on such jobs.

63. Plaintiff here re-alleges as fully as though here set out Subparagraphs 43 through 47 of Paragraph XI.

XVI
PRAYER FOR RELIEF

WHEREFORE, plaintiff prays as follows:

(1) That the alleged combination and conspiracy among the defendants be adjudged and decreed to be an unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act; and

(2) That the plaintiff have and recover from the defendants a judgment for treble the amount of the damages as will be shown by proof under its first cause of action; or

(3) That plaintiff have and recover from defendants judgments for treble the amount of its damages as will be shown by proof under each of its alternative causes of action; and

(4) That plaintiff have an injunctive decree forbidding the further employment against its interests of those conspiratorial tactics hereinabove set forth; and

(5) That each member of the class being composed of those public end users who have purchased the hereinabove defined types of pipe from the defendants, co-conspirators and others directly or indirectly be allowed to intervene in this action either before or after judgment for the purpose of proving the amount of damages suffered by it and recovering three-fold the same, together with its litigation expenses and a reasonable attorney's fee; and

(6) That the plaintiff be awarded its litigation expenses and a reasonable attorney's fee as required by Section 4 of the Clayton Act (15 U.S.C. § 15); and

(7) That plaintiff have such other and further relief as the court shall deem just and proper.

Dated this 13th day of May, 1969.

VERNON B. ROMNEY
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/s/ Vernon B. Romney

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Plaintiff herein respectfully demands a jury, pursuant to Rule 38 (b) of the Federal Rules of Civil Procedure.

Filed May 13, 1969.

Motion for Order That This Action Shall Not Be Maintained as a Class Action.

United States District Court, Central District of California.

State of Utah, on behalf of itself and all others similarly situated, Plaintiffs, vs. American Pipe and Construction Company; United Concrete Pipe Corporation; Utah Concrete Pipe Company; W. R. White Company; United States Steel Corporation; Kaiser Steel Corporation; Smith-Scott, Inc.; U.S. Industries, Inc., Defendants. Civil No. 69-1964-HP.

Pursuant to Rule 23 of the Federal Rules of Civil Procedure and the Order of this Court dated July 17, 1969, the undersigned defendants move the Court for its order determining that this action shall not be maintained as a class action.

This motion is made upon the grounds that the action is not a class action within the meaning of Rule 23, Federal Rules of Civil Procedure, that the prerequisites to a class action prescribed by Rule 23(a) and (b) are not present in the action and that a class action is inferior to other available methods for the fair and efficient adjudication of the action. This motion is based upon the Affidavit of Jesse R. O'Malley, and Memorandum of Points and Authorities attached hereto, and all pleadings, papers, documents and other Exhibits which are on file in this cause of action at the time this motion comes on for hearing.

DATED: November 14, 1969.

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JESSE R. O'MALLEY

Findings of Fact and Order Respecting Class Action.

United States District Court, Central District of California.

State of Utah, on behalf of itself and all others similarly situated, Plaintiffs, vs. American Pipe and Construction Company; United Concrete Pipe Corporation; Utah Concrete Pipe Company; W. R. White Company; United States Steel Corporation; Kaiser Steel Corporation; Smith-Scott, Inc.; U.S. Industries, Inc., Defendants. Civil No. 69-1964-MP.

Defendants herein having moved for an order of this Court determining this action shall not be maintained as a class action, and the same having come on for hearing on December 1, 1969, and plaintiffs and defendants having adduced evidence with respect thereto and the Court being fully advised in the premises, finds as follows:

1. Numerous other parties, who would clearly qualify as members of the general class alleged by plaintiffs, have heretofore commenced actions on their own behalf. Between August 1964 and April 1966, over 100 separate actions allegedly arising out of this same "Western Pipe Conspiracy" were filed in eight different United States District Courts of the Ninth Circuit. In three actions members of an alleged class in those actions purported to represent the same broad class of "public end-users" which plaintiffs herein claim to represent, and in another action, the State of California claimed to represent all of the public end-users within said State. All the aforesaid actions and resulting settlements were widely publicized and potential plaintiffs, throughout the "Western Area," should have had notice thereof prior to the termination, during 1967, 1968 and 1969, of said actions.

2. The entities alleged by plaintiff to be members of the class described in the Complaint, in fact, are not so numerous that joinder of all such entities is impracticable.

3. A class action has heretofore been shown to be inferior to other available methods for the fair and efficient adjudication of the instant controversy, and the Court so finds in accordance therewith.

NOW, THEREFORE, IT IS ORDERED, that the action herein may not be maintained as a class action and, no parties having joined therein, the class action, alleged in the Complaint herein, in all respects stands terminated as of May 13, 1969, the date of the filing of the Complaint herein.

DATED: Dec. 3, 1969.

/s/ Martin Pence
United States District Court Judge

Filed December 4, 1969.
[Endorsement omitted in printing]

Entered December 4, 1969.
[Endorsement omitted in printing]
[Certification omitted in printing]

Decision on Defendants' Motion Opposing Class Action.

United States District Court, Central District of California.

State of Utah, on behalf of itself and all others similarly situated, Plaintiffs, vs. American Pipe and Construction Company; United Concrete Pipe Corporation; Utah Concrete Pipe Company; W. R. White Company; United States Steel Corporation; Kaiser Steel Corporation; Smith-Scott, Inc.; U.S. Industries, Inc., Civil No. 69-1964-MP.

On May 13, 1969, the State of Utah filed this "western pipe" Sherman § 1 antitrust action against certain concrete and steel pipe manufacturing companies, seeking treble damages and injunctive relief on its own behalf and in addition, claimed to represent a class described as (1) "those public bodies and agencies of state and local government in the State of Utah who are end users of pipe acquired from the defendants, coconspirators and others"[1] and (2) those states in the Western Area which have not previously filed a similar action.[2]

Defendants have moved for an order that the action not be maintained as a class action.

Plaintiff denominated "those states in the Western Area" as being the states of "Wyoming, Nevada and Idaho", and includes along with them the public bodies and agencies of the states and local governments in those several states and Utah who are end users of pipe acquired from the defendants, etc. Appended to plaintiff's memorandum in support of its class action allegations is a list of what this court can only deter-

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[1]Complaint, para. 1, pp. 1-2.
[2]Complaint, para. 2, p. 2.

mine to be every incorporated whistle-stop, hamlet, village, town, city, county, and water and sewer improvement district in Utah, Nevada, Wyoming and Idaho. The several collections of whistle-stops, etc., total some 300 for Utah, 240 for Idaho, 270 for Wyoming, and 31 for Nevada.[8] Plaintiff did not represent that each was actually an end user of pipe—plaintiff just made a list.

As indicated in the chronological history of the western pipe cases set forth in this court's decision of August 1, 1969, in *Maricopa County v. American Pipe and Construction Co., et al.*, 303 F.Supp. 77 (D. Ariz. 1969), the government's criminal complaint against some of the defendants named in the instant action was filed on March 10, 1964, and on June 23, 1964, the government's civil actions were started.

As this court held in *Maricopa*, the government's criminal and civil actions tolled the statute of limitations until May 24, 1969. Beginning in August 1964, Clayton § 4 treble damage antitrust actions were thereafter filed by the states of Hawaii, California, Oregon, Washington and Arizona against American Pipe and Construction Company, United Concrete Pipe Corp., U.S. Steel, Kaiser Steel, Smith-Scott, Inc., and U.S. Industries, all defendants herein, as well as other defendants, charging exactly the same general antitrust conspiracies, etc., as set forth in the *Utah* complaint. In each of the complaints of the states of Hawaii, California, Oregon and Washington, and of the United

[8]The Nevada list includes the City of Las Vegas, which on January 9, 1968, filed its own private western pipe antitrust civil action in No. 1107-LV, District of Nevada, against American Pipe and Construction Company, Martin-Marietta Corp., and United Concrete Pipe Co., and concluded the same by way of settlement on November 20, 1968.

States, as well as in three other of the 100 separate end user actions filed "in the Western Area", these actions were denominated "class actions" under the old (pre 1966) Rule 23, F. R. Civ. P. This court, treating them as spurious class actions, permitted intervention by all aggrieved public bodies of those several states and gave ample time for joinder. The sum total of the actual parties joining in the class actions, in those four states, plus the state and other public bodies in Arizona, as well as the City of Las Vegas, Nevada, and other private end user actions, totaled some 350 plaintiffs. All of the parties involved in the "class actions" have settled their claims and the actions have been dismissed. The United States Government has also settled its end user claims arising out of the "western pipe" conspiracy, as have all other but some one-half dozen late, late filing individual claimants.

Massive discovery, with depositions in depth of the knowledgeable employees of the major conspirators, together with centralized deposit of thousands of documents relative to the underlying alleged conspiracy, is long since ended. The publicity regarding the suits —covering interim rulings by this court over the past five years, published in CCH Trade Regulation Reports, BNA Law Week, and West's Federal Supplement, together with newspaper publicity anent filing of suits and settlement sums received by public bodies, has been spread throughout the western states during the past five years.

The court will take judicial notice that in November of 1968 at the conference of the National Association of State Purchasing Agents, held in Honolulu, representatives of the State Purchasing Agents of Nevada and Utah were present when this judge delivered an

address covering in depth some of the problems of antitrust litigation in the western pipe cases. This court will also take judicial notice that Lewis Markus, Chief, Economic Section, Antitrust Division, United States Department of Justice, has been, as he himself admits, "somewhat of a fixture on the program of each of the Association's annual meetings since about 1961," and has reported to the state purchasing agents on problems of identical bidding and significant antitrust cases brought in each preceding year. The court will also take judicial notice that there is a National Association of Attorneys General which holds annual conventions. The court will also take judicial notice that each of the public bodies who joined in the western pipe litigation actions above indicated, had its own private attorney, although the litigation was headed up in almost every instance through the states' attorneys general. In those cases, as in this, in most instances, private antitrust counsel was employed to assist the states.[4]

It is with the above background that the court here approaches the threshold problem facing every court

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[4]The instant problem was argued on December 1, 1969. On that morning, an Assistant Attorney General for the State of Idaho filed an affidavit (its first and only) in support of the class action, in which the following appears:

> "The Attorney General of the State of Idaho has heretofore relied exclusively upon Special Assistant Attorneys General appointed from private law firms to represent the state in antitrust matters. Prior to May 13, 1969, the Special Assistant Attorney General informed ROBERT M. ROBSON that the State of Idaho did not sustain sufficient damage as a result of the alleged violations in the above entitled matter to warrant the expense involved in instituting an independent action on behalf of the State of Idaho. Relying upon this advice, the Idaho Attorney General did not file a complaint against the above named Defendants.
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> "Information subsequently came to the attention of the Idaho Attorney General that . . . Utah had filed . . . suit. . . ."

in all Rule 23(b)(3), F. R. Civ. P., problems, viz.: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." F. R. Civ. P., Rule 23(c)(1).

The complaint, on its face (even though its allegations but barely escape violating the minimum requirements of Rule 23(b), in that it barely goes beyond repetition of the language of the Rule, see *Gillibeau v. City of Richmond, et al.*, Ninth Circuit No. 23,026 (decided October 13, 1969)), when considered with the list of some 800 inferentially potential plaintiffs referred to above, would appear, superficially, to meet the first prerequisite under Rule 23(a), viz., that the class is so numerous that joinder of all members is impracticable—but more of that hereafter. The allegations that there are questions of law and fact common to the claims, likewise would appear to have some merit even though, as this court would judicially notice, from its five-year experience dealing with this same western pipe problem, that some threads of a common "western pipe" conspiracy involving some of here named defendants have been found in each of the states and localities involved in the actions heretofore filed. Also the court would notice that the parties involved in the alleged conspiracy shifted from not only state to state but locality to locality, as did the effect of the conspiratorial acts upon prices. The court notes, for example, that the Utah Concrete Pipe Company and the W. R. White Company, defendants herein, have never been named in any other complaint heretofore filed in the western pipe end user cases and that in their moving papers in the instant class action problem they allege that they have not operated outside

of the state of Utah. An inference to be drawn from the above, of course, would be that other parties defendants might well have to be joined in the other three states affected by the alleged class action. Even if this occurred, however, the court would recognize that there would probably be questions of law and fact common to the "class" claims insofar as the underlying alleged conspiracy of the defendants named herein other than White and Utah Concrete. Thus, on its face, the complaint would apparently meet the second prerequisite of Rule 23(a).

Moreover, the claims of the state of Utah for injury and damages resulting from the alleged conspiracy would probably be generally typical of the claims of the states of Idaho, Wyoming and Nevada, but this court's past experience in the "western pipe" cases has shown that the percentage of artificial price increase, resulting from absence of meaningful competition and stemming from the alleged conspiracy, has varied from locality to locality, not only between states but between localities within the several states. While this might nevertheless meet the prerequisites of Rule 23(a)(3), it would create a question as to whether or not the representative party could adequately protect the interest of the several members of the class. This inner conflict was heretofore illustrated by the difference between Washington Public Power Supply System claims, as contrasted with those of the State of Washington,[5] wherein the State of Washington settled out and the Washington Public Power went to trial on its separate

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[5] *Washington Public Power Supply System v. American Pipe and Construction Co., et al.*, Civil No. 6568, W.D.Wash.; *State of Washington, et al. v. American Pipe and Construction Co., et al.*, Civil No. 3157, W.D.Wash.

and independent theory of damages. But perhaps this too might not be fatal to the plaintiffs' class action.

What *is* fatal to plaintiffs' class action allegations are the raw facts of the past five years litigation on almost precisely the same facts and problems of law set forth in plaintiffs' complaint, and this prior litigation is a criteria which this court must consider in resolving the "threshold problem." *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555 (2 Cir., 1968).

At the time the various "class actions" were heretofore filed in the various states, as previously indicated they were "spurious class actions", thereby necessitating joinder. Suit and complaint notice was given to public bodies throughout the states of Hawaii, California, Oregon and Washington by the several attorneys general to all potential plaintiffs in those several states. The end result of such notices was that thereafter there was a joinder of all public bodies which had claims against the several "western pipe" defendants. This court had no difficulty whatsoever in handling the conjoined problems of members of the so-called classes.

Therefore, although here plaintiffs have alleged that the class is so numerous that joinder of all the 800 listed potential members is impracticable, this court cannot accept that numerical list as in any way truly representative of the number of public bodies in the several states who were actually affected by the alleged conspiracy—nor is it so alleged! Based upon population and population expansion in those states over the past twenty years, the court could take judicial notice that the number of end users in Hawaii, Arizona, California, Washington and Oregon should at least be

more than seven times as many as the total number of end users in the four states named in the present "class." In any event, the court can but conclude that the number of public entities in Utah, Wyoming, Nevada and Idaho who might have been injured by the alleged conspiracy could not possibly exceed the 350 cases heretofore filed by end users in the other states of the "Western Area." From prior actual experience in like cases involving the same alleged conspiracy, this court could not find that number so numerous that joinder of all members was impracticable, nor can it conclude that a class action here would achieve economies of time, effort and expenses or promote any more uniformity of decision than the joinder method heretofore proved successful.[6] To the contrary, the fact of joinder and intervention has made the determination of actual parties plaintiffs and defendants, as well as the percentage of damage determination, much simpler, easier and more practicable than would have been any class action procedure under the present Rule 23(b)(3).

The court therefore finds that the first prerequisites to a class action have not and cannot here be met. Defendants' motion that this action not be maintained as a class action is GRANTED.

This court cannot pass by, without commenting thereon, the statement of Gerald R. Miller, counsel for plaintiffs, set forth in his affidavit in support of class action, page 2:

> "*If they had thought the law to be otherwise, the Attorney General in his official capacity would certainly have urged each of these govern-*

[6]Notes of the Advisory Committee, 39 FRD 75, 102-03 (1966).

> *mental entities to file an individual action.* It was determined, however, that such a procedure would do little more than complicate this action with a multitude of individual plaintiffs, each seeking a similar relief based upon a common violation of the law." (Emphasis added.)

The court notes from plaintiff's affidavits that the Attorney General of the State of Utah and Attorney Miller sometime in October 1968—over six months before the statute of limitations ran—started a study of the western pipe conspiracy. Any detailed study of the litigation then and theretofore pending in the western pipe cases would have disclosed the facts which this court has above recited. A study of the law on the application of a class action to pipe cases as reflected in *City of New York v. International Pipe & Ceramics Corp.* (44 FRD 584, S.D.N.Y., April 16, 1968) reported in Trade Regulation Reports shortly thereafter, and in Federal Rules Decisions in November 1968, should also have raised a caveat in Utah's determination of the law which might be applied to the present litigation. It should have been unquestioned on the part of the plaintiffs' attorneys that individual action by affected parties, particularly the states, large cities and other large public entities in the Western Area, should have been taken long before any class action was belatedly filed in this case, if in fact any of them believed the alleged conspiracy had injured them.

Plaintiffs' attention is also called to *Dolgow v. Anderson,* 43 FRD 472, 484, E.D.N.Y. January 3, 1968 (Weinstein, J.): Alternative devices of "joinder, intervention, consolidation, and the test case"—"presuppose 'a group of economically powerful parties who are obviously able and willing to take care of their own in-

terests individually through identical suits or individual decisions about joinder or intervention' [quoting from Frankel in 32 Antitrust L.J. 295, 298 (1966)]." The court feels sure that plaintiffs' counsel would agree that his client, as well as most, if not all, members of the so-called class would properly fall into the group described by Judges Weinstein and Frankel.

DATED: Honolulu, Hawaii, this 11 day of December, 1969.

/s/ Martin Pence
United States District Judge

Filed December 17, 1969.

Motion to Intervene as Plaintiffs.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al. Defendants, Weber Basin Water Conservancy District, et al. Applicants for Intervention. Civil No. 69-1964-MP.

Pursuant to Rule 24(a)(2) or in the alternative Rule 24(b)(2) of the Federal Rules of Civil Procedure, Weber Basin Water Conservancy District, Salt Lake County Water Conservancy District, Salt Lake City Suburban Sanitary District No. 1, Salt Lake City Suburban Sanitary District No. 2, Bountiful Water Subconservancy District, Bona Vista Water Improvement District, Central Weber Sewer Improvement District, Granger-Hunter Improvement District, Metoropolitan Water District of Salt Lake City, Central Davis County Sewer District, North Davis County Sewer District, Ogden River Water Users Association, Sandy Suburban Improvement District, South Davis County Sewer Improvement District, South Davis County Water Improve-

ment District, South Ogden Conservation District, Taylorsville-Bennion Improvement District, Weber-Box Elder Conservation District, Salt Lake County, Box Elder County, Cache County, Emery County, San Juan County, Wasatch County, Salt Lake City, Ogden City, Provo City, City of South Ogden, City of Logan, Cedar City, City of Kaysville, City of Layton, City of Washington Terrace, City of West Jordan, City of Vernal, City of Salem, City of Roy, City of Springville, City of Price, City of Pleasant Grove, City of Payson, City of Oak City, City of North Salt Lake, City of Myton, City of Murray, City of Mt. Pleasant, City of Monticello, Town of Minersville, City of Midvale, City of Manti, City of Lehi, Town of Levan, Town of Huntsville, City of Helper, City of Garland, City of Fillmore, Town of Elwood, Town of East Layton, City of Clearfield, City of Castledale, City of Beaver, City of Nephi, Town of West Point, and City of Blanding, and each of them, jointly and severally, move for leave to intervene as plaintiffs in this action in order to assert the claims set forth in the proposed complaint, of which a copy is hereto attached, on the following grounds:

1. The applicants claim interests relating to the transaction which is the subject of the above-entitled action, and they are so situated that the disposition of the action may, as a practical matter, impair or impede their ability to protect their intersts.

2. Applicants' claims as set forth in their proposed complaint arise out of the main action in the above-entitled case and have questions of law and fact in common.

3. Granting this motion for intervention will not unduly delay or prejudice the adjudication of the rights of the original parties.

4. Applicants are end users of the pipe described in the complaint of plaintiff State of Utah and have purchased substantial amounts of said pipe during the periods described in said complaint. The amount of said pipe purchased by applicants aggregates in excess of $20,000,000. Applicants are members of the class which the State of Utah has sought to represent in the above-entitled action and which was defined in the complaint of the State of Utah to include public bodies, political subdivisions and districts of the State of Utah who are end users of pipe acquired from the defendants, co-conspirators and others. As members of said class, applicants would have relied upon the State of Utah to represent their interests in this action; however, the Court's Findings of Fact and Order Respecting Class Action which was entered on December 4, 1969 makes it mandatory for applicants to seek to intervene in order to protect their interests.

5. As members of the class alleged by the State of Utah in its complaint, applicants have inchoate interests in this action.

6. Unless applicants are allowed to intervene in this action, they may have no other means available by which to present their claims to a court.

Dated this 11th day of December, 1969.

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Attachment to Motion to Intervene as Plaintiff Intervenors' Complaint [Proposed]. (Jury Demanded).

United States District Court, Central District of California, Civil No. 69-1964-MP.

[Title omitted in printing]

Intervenors, and each of them, by their attorneys, intervene in this civil action on their own behalf to secure treble the amount of damages suffered by each of them due to the defendants' violations of the antitrust laws of the United States. Intervenors demand a trial by jury and allege as follows:

FIRST CAUSE OF ACTION

I

JURISDICTION AND VENUE

1. This complaint is filed and the jurisdiction of this Court is invoked under the provisions of Section 4 of the Act of Congress of October 15, 1914, c. 323, 38 Stat. 731, as amended, (15 U.S.C. § 15), entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes," commonly known as the Clayton Act, to recover damages for injuries to their business or property which the intervenors have sustained due to violations by the defendants of Section 1 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, (15 U.S.C. § 1), entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act.

2. The complaint of the plaintiff State of Utah was filed on May 13, 1969 in the District of Utah. Each corporate defendant maintains an office, transacts busi-

ness, is found, resides, or has an agent in the District of Utah, and each of said corporate defendants was within the jurisdiction of that court for the purpose of service. Each of the defendants in this case was served and has entered appearance through counsel.

3. The interstate trade and commerce described herein is carried on in part within the District of Utah. Many of the unlawful acts done pursuant to the combination and conspiracy herafter alleged have been performed within the District of Utah.

4. This Court has jurisdiction of the above-entitled matter for coordinated or consolidated pretrial proceedings pursuant to the order of the Judicial Panel on Multidistrict Litigation which was entered on August 28, 1969.

II

DEFINITIONS

5. As used herein the term:

(a) "Steel small diameter pressure pipe" (herein referred to as "steel SDP pipe") means thin-walled welded steel pipe which is manufactured in diameters of 4 inches to 48 inches and sold for the conveyance of water or sewage under internal pressure exceeding 115 feet of head or 50 pounds per square inch.

(b) "Alternate small diameter pressure pipe" (herein referred to as "alternate SDP pipe) means small diameter pressure pipe (herein referred to as "SDP pipe") which is manufactured and sold or offered for sale on jobs where the specifications permit the use of either concrete SDP or steel SDP pipe.

(c) "Steel large diameter pressure pipe" (herein referred to as "steel LDP pipe") means heavy-walled

welded steel pipe which is manufactured in diameters of over 24 inches and sold for the conveyance of water and sewage under internal pressures exceeding 115 feet of head or 50 pounds per square inch.

(d) "Alternate large diameter pressure pipe" (herein referred to as "alternate LDP pipe") refers to large diameter pressure pipe (herein referred to as "LDP pipe") which is manufactured and sold or offered for sale on jobs where the specifications permit the use of either concrete LDP pipe or steel LDP pipe. The specifications for alternate LDP pipe customarily require that the pipe be lined and/or coated with concrete.

(e) "Concrete pipe" means pipe constructed of concrete either with or without metal components as hereinafter defined to convey water and sewage and includes both pressure and nonpressure pipe.

(f) "Metal components" refers to the steel plates, sheets, skelp, rods, wire and/or mesh used in the manufacture of concrete pipe and to the steel plate and sheets used in the manufacture of steel SDP and LDP pipe.

(g) "Western Area" refers to the states of California, Oregon, Washington, Arizona, New Mexico, Utah, Wyoming, Nevada, Idaho and Hawaii.

(h) "Public end users" means the State of Utah and its political subdivisions and districts who, as consumers, purchase and install or have installed any of the types of pipe above defined in systems primarily for the conveyance of drinking water and sewage under pressure and for drainage, irrigation, flood control and similar purposes.

III
DESCRIPTION OF THE PARTIES

6. Plaintiff, the State of Utah, through its departments, divisions, agencies, institutions, universities and colleges, is an end user of the types of pipe herein defined acquired from defendants, co-conspirators and others directly or indirectly.

7. Intervenors are political subdivisions of the State of Utah, including counties, cities and municipalities, and also including districts comprising public entities organized under the laws of Utah, including sewer and water districts. Each of the intervenors are end users of the pipe herein defined acquired from defendants, co-conspirators and others directly or indirectly.

8. The intervenors own, construct, alter, maintain and operate water and sewage projects, highways and other facilities for the rendering of public services and by means of awarding public construction contracts, acquire materials and services including pipe as defined herein.

9. Defendants:

(a) Defendant American Pipe and Construction Company (hereinafter called "American") is a corporation existing under the laws of the State of California with its principal place of business in Monterey Park, California. American is engaged, among other things, in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(b) Defendant United Concrete Pipe Corporation (hereinafter called "United") is a corporation organ-

ized and existing under the laws of the State of California with its principal place of business in Baldwin Park, California. United is engaged, among other things, in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(c) Defendant Utah Concrete Pipe Company (hereinafter called "Utah Pipe") is a corporation organized and existing under the laws of the State of Utah with its principal place of business in Ogden, Utah. Utah Pipe is engaged, among other things, in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(d) Defendant W. R. White Company (hereinafter called "White") is a corporation organized and existing under the laws of the State of Utah with its principal place of business in Ogden, Utah. White is engaged, among other things, in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(e) Defendant United States Steel Corporation (hereinafter called "U.S. Steel") is a New Jersey corporation which in 1948 acquired the Consolidated Western Steel Corporation, which during the period of the conspiracy herein alleged it operated as a division of U.S. Steel. During this time U.S. Steel, among other things, engaged in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(f) Defendant Kaiser Steel Corporation (hereinafter called "Kaiser") is a corporation organized and existing under the laws of the State of Nevada with its principal place of business in Oakland, California. Kaiser was, during the period of time covered by this complaint, engaged, among other things, in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(g) Defendant Smith-Scott, Inc. (hereinafter called "Smith-Scott") is a corporation organized and existing under the laws of the State of California, with its principal place of business in Riverside, California. Smith-Scott, among other things, is engaged in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

(h) Defendant U.S. Industries, Inc. (hereinafter called "U.S.I.") is a Delaware corporation which in 1955 purchased the assets of Southern Pipe and Casing, which during the period of the conspiracy herein alleged, it operated as the Tubular Products Division of U.S.I. with offices in Azusa, California. During the period of the conspiracy herein alleged, U.S.I, through its Tubular Products Division, engaged in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined herein to customers within the Western Area.

10. Martin-Marietta Corporation (hereinafter called "Martin-Marietta") and various other corporations, partnerships and individuals engaged in the business of manufacturing or furnishing and selling and offering for sale of some one or more of the types of pipe defined

herein to customers within the Western Area, are named as co-conspirators herein. Each of them participated with defendants and with other co-conspirators in the offense charged and performed acts and made statements in furtherance thereof.

IV

NATURE OF TRADE AND COMMERCE

11. The defendants Smith-Scott, U.S.I. and U.S. Steel are the principal manufacturers of steel SDP pipe in the Western Area. Total sales of steel SDP pipe by these defendants during the period May, 1958 through January, 1962 averaged at least $13,500,000 annually.

12. Defendants American, Smith-Scott, U.S.I., U.S. Steel and United are the principal manufacturers of alternate SDP pipe in the Western Area. Total sales of alternate SDP pipe by these defendants during the period 1957 through 1961 inclusive averaged approximately $18,000,000 annually.

13. The defendants American, Kaiser, United and U.S. Steel are the principal manufacturers of alternate LDP pipe in the Western Area. Total sales of alternate LDP pipe by these defendants during the period 1958 through 1961 inclusive averaged at least $15,000,000 annually.

14. The defendants Kaiser and U.S. Steel are the principal manufacturers of steel LDP pipe in the Western Area. Total sales of steel LDP pipe by these defendants during the period 1958 through 1961 inclusive, averaged at least $7,000,000 annually.

15. The defendants American and United are the principal manufacturers of concrete pipe in the Western Area. Total sales of concrete pipe by these defendants

during the period 1958 through 1961 inclusive averaged at least $41,500,000 annually.

16. The defendants Utah Pipe and White are manufacturers and vendors of some of the types of concrete pipe defined in this complaint. During the period of the conspiracy alleged herein said defendants were significant market factors in at least Utah, a part of the Western Area.

17. The co-conspirator Martin-Marietta is a manufacturer and vendor of concrete pipe of the types defined in this complaint. During the period of the conspiracy alleged herein Martin-Marietta was a significant market factor in the Western Area.

18. The construction of systems utilizing the types of pipe herein defined is customarily contracted for by the public end user with general contractors on the basis of competitive bids. Where it is appropriate and desired by the end user, the end user drafts or has drafted specifications allowing the use of steel LDP or SDP, concrete or either steel or concrete LDP or SDP pipe in the alternative.

19. Prior to submitting bids to the end user, the general contractor usually solicits quotations from pipe manufacturers for the purchase price of the pipe delivered to the site where it is to be installed. The award winning contractor usually contracts for the purchase of the pipe from the low quoting pipe manufacturer at the price quoted by the latter. Occasionally the end user contracts directly with the pipe manufacturer for the purchase of said pipe and usually on the basis of competitive bidding.

20. The specifications for alternate LDP pipe customarily require that the pipe be lined and/or coated

with concrete. When the steel LDP pipe manufacturers plan to submit bids or quotations or an alternate LDP pipe job, they in turn solicit quotations or bids from the concrete LDP pipe manufacturers for the performance of this service. The cost of this service is then incorporated in the quotation or bid submitted to the general contractors or end users by the steel LDP pipe manufacturer.

21. Because of the relatively limited number of manufacturers of the type of pipe defined in this complaint, general contractors and end users frequently solicit quotations and bids from manufacturers outside the state where said pipe is to be installed. Manufacturers of said pipe usually manufacture the pipe for a particular job only after receiving an order for it. Said manufacturers customarily identify each section of pipe so as to designate its position in the pipeline and deliver or have delivered said pipe directly to the trench site or as near as possible to the place where it will be installed. During the period of the conspiracies herein alleged, the defendants herein have manufactured substantial quantities of the types of pipe herein defined at their plants within the Western Area and elsewhere, and in response to solicitations calling for bids on the types of pipe herein defined have sold, shipped and delivered said pipe to job sites outside the state where it was manufactured. Numerous of these job sites were and are situated within the State of Utah, thus the types of pipe herein defined move in a continuous and uninterrupted flow from the place of manufacture, including the plants of the defendants herein to points of installation outside the state where said pipe was manufactured.

22. Steel SDP pipe and steel LDP pipe are fabricated largely from steel sheet and plate. Most concrete pipe is manufactured with metal components to strengthen the pipe, and particularly with respect to concrete pressure pipe to make it watertight. The defendant manufacturers purchase or produce said steel plate or metal components in anticipation of orders for or to enable them to fill existing orders for the types of pipe herein defined, except nonreinforced concrete pipe. Substantial quantities of the steel plate or metal components which the defendants use in manufacturing the types of pipe herein defined, except nonreinforced concrete pipe, are produced outside the state where said pipe is manufactured. The movement in interstate commerce of the steel plate and metal components is necessary to the manufacture and sale of said pipe by the defendants in the Western Area, and the defendants and co-conspirators are conduits through which said steel plate and metal components flow in a continuous and uninterrupted stream in interstate commerce from the place where said steel plate or metal components are produced to the place within the Western Area where they are fabricated into the types of pipe herein defined and on to the installation site.

23. Any restraint upon free competition in the production or sale of the types of pipe herein defined in the Western Area necessarily and directly affects the interstate flow of said pipe and the interstate flow of the sheet and steel plate and the metal components utilized in the manufacture of all of said types of pipe, except nonreinforced concrete pipe.

V

OFFENSES CHARGED

24. Beginning prior to the year 1954 in the case of concrete pipe and prior to the year 1958 in the case of steel pipe and probably as far back as 1946 in both cases and continuing so far as intervenors know to the date of the filing of this complaint, the defendants and co-conspirators engaged in an unlawful combination and conspiracy to eliminate competition and stabilize and maintain the prices of the herein defined types of pipe, thereby restraining the hereinabove described interstate trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. § 1, commonly known as the Sherman Act.

25. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among and between the defendants and co-conspirators, the substantial terms of which were:

(a) To submit collusive and rigged bids and quotations in response to solicitations calling for bids and quotes for the herein defined types of pipe.

(b) To allocate and divide orders for the purchase of the herein defined types of pipe among themselves.

(c) To refrain from competing in the manufacture of certain sizes and types of pipe in certain areas where those sizes and types were manufactured by another defendant or co-conspirator.

26. For the purpose of forming and effectuating the aforesaid combination and conspiracy, the defendants and co-conspirators did those things which, as hereinabove alleged, they combined and conspired to do, including, but not limited to the following:

(a) Defendants and co-conspirators held periodic meetings to tally past orders and to discuss prospective orders for the purpose of allocating prospective orders among themselves according to agreed upon percentages.

(b) At such meetings and in subsequent communications by telephone and other interstate communication media, the defendants and co-conspirators agreed between and among themselves as to which manufacturer would submit the low bid and what that bid would be and which manufacturers would refrain from bidding or would submit higher complementary bids not intended to win awards and what those bids would be.

(c) At such meetings and at subsequent meetings, defendants and co-conspirators would agree in certain instances as to the types and sizes of pipe each would manufacture and market in certain geographical areas included in the Western Area.

VI

EFFECTS OF THE CONSPIRACY

27. The aforesaid combination and conspiracy had, among others, the following effects:

(a) Competition between and among defendants and co-conspirators has been restricted and suppressed.

(b) General contractors and end users were deprived of the right to receive competitive bids and quotes for the types of pipe herein defined and were deceived into believing that collusive and noncompetitive bids and quotes were competitive.

(c) Public end users and others engaged in the conveyance and distribution of water and sewage have been denied the right to receive competitive sealed bids

as required by law or practice or have been denied a competitive market in connection with their purchases and have been forced to pay high, artificially fixed prices for the types of pipe herein defined.

(d) The cost of the types of pipe herein defined has been arbitrarily increased, fixed and maintained.

(e) The business and property of intervenors, as intended by the defendants and co-conspirators, were injured in that they were compelled to pay higher prices for the types of pipe herein defined than they would have had to pay had it not been for the aforementioned combination and conspiracy.

VII
TOLLING OF THE STATUTE OF LIMITATIONS

28. Intervenors did not discover said combination and conspiracy until the year 1969. Intervenors had no knowledge of the said combination and conspiracy or of any facts which might have led to the discovery thereof until after March 10, 1964, when a United States Grand Jury sitting in the Southern District of California, Central Division, returned indictments numbered 33338-42 inclusive, setting out in large part the combinations and conspiracies herein alleged. Intervenors could not have uncovered the conspiracy at an earlier date by the exercise of due diligence inasmuch as the unlawful conspiracy had been fraudulently concealed by defendants and co-conspirators through their adoption of elaborate schemes for submitting sham and collusive bids which misrepresented the independence and competitiveness thereof and their resort to secrecy to avoid detection as hereinabove alleged.

29. Since March 10, 1964 and continuing through and one year from the date of the entering of a Consent Decree against the last remaining defendant in a government case, said Consent Decree having been entered on May 24, 1968, the running of the statute of limitations has been suspended by reason of 15 U.S.C. § 16 (b), commonly referred to as § 5 (b) of the Clayton Act because of the pendency of actions instituted by the United States of America. This complaint is based in part upon matters alleged in those government actions.

30. The defendants Utah Pipe and White were neither defendants in the government actions nor named co-conspirators. As to those defendants, intervenors have no knowledge of the said combination and conspiracy or any facts which might have led to the discovery thereof prior to at least the year 1969. Intervenors could not have uncovered the conspiracy as to these defendants at an earlier date by the exercise of due diligence inasmuch as said defendants and other co-conspirators acted together and individually by agreement to conceal the existence of said combination and conspiracy and the acts performed in furtherance thereof. Their adoption of schemes for submitting sham and collusive bids and quotations which misrepresented the independence and competitiveness thereof is but one manifestation of their resort to secrecy.

31. Intervenors are members of the class which the State of Utah seeks to represent in the above entitled action and which was defined in the complaint of the State of Utah to include public bodies and agencies of state and local government in the state of Utah who are end users of pipe acquired from the defendants, co-conspirators and others. As members of said class In-

tervenors would have relied upon the State of Utah to represent their interests in this action, however, the Court's order entered on December 4, 1969 terminating the class action makes it mandatory for intervenors to intervene in this matter in order to protect their interests.

VIII
INJURY TO INTERVENORS

32. Since at least 1946 intervenors have acquired substantial quantities of the types of pipe herein defined which have been manufactured by defendants, co-conspirators and others. In acquiring said pipe intervenors have usually invited formal sealed competitive bids from manufacturers directly or from prime contractors, and they have generally accepted the price offered by the lowest responsible bidder.

33. When acquiring said pipe directly from manufacturers intervenors have been led and induced by the defendants and co-conspirators, as a result of the illegal combination and conspiracy alleged herein, to make contract awards at prices fixed by and influenced by said illegal combination and conspiracy, and intervenors have been denied the benefit of free and unrestricted competition in their acquisition of said pipe. By the operation of defendants' and co-conspirators' agreements and concert of action herein alleged, intervenors have been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

34. When acquiring said pipe through prime contractors, intervenors have been forced to make contract awards on bids or quotes incorporating prices fixed by and influenced by the defendants' and co-conspirators' il-

legal combination and conspiracy, and intervenors have been denied the benefit of free and unrestricted competition in their acquisition of said pipe. By the operation of defendants' and co-conspirators' agreements and concert of action herein alleged, intervenors have been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

35. As a result of the alleged illegal combination and conspiracy, intervenors have been injured and financially damaged by the defendants in an amount which is presently undetermined. Intervenors specifically reserve the right to determine the exact amount of their injury and upon such determination or at such other time as the court directs to amend this complaint and set forth in said amendment or whatever other means the court may direct, the exact amount of their injury.

IX

ADDITIONAL CAUSES OF ACTION ALTERNATIVE TO THE ABOVE FIRST CAUSE OF ACTION

36. As additional causes of action alternative to the above first cause of action intervenors allege that commencing at least as early as the year 1954 and continuing until at least 1962, the exact dates being unknown to intervenors, the defendants and co-conspirators engaged in a continuing course of conduct which consisted of a series of combinations, conspiracies and agreements in restraint of the aforesaid interstate trade and commerce in the types of pipe herein defined. These combinations, conspiracies and agreements are described in the following alternative causes of action. Intervenors

herein allege and incorporate by reference in each of the alternative causes of action as fully as though there separately set out, Paragraphs I through IV, Paragraph VI and Paragraph VII.

X

SECOND CAUSE OF ACTION

(Combination and Conspiracy Involving Steel Small Diameter Pressure Pipe)

37. Beginning at least as early as May, 1958 and continuing thereafter until at least January, 1962, the exact dates being unknown to intervenors, the defendants U.S. Steel, U.S.I. and Smith-Scott and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinabove described interstate trade and commerce in steel SDP pipe in violation of Section 1 of the Act of Congress of July 2, 1890, c. 647, 26 Stat. 209, as amended, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act.

38. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among said defendants and co-conspirators, the substantial terms of which were:

(a) To submit collusive and rigged bids and quotations for the sale of steel SDP pipe; and

(b) To allocate and divide orders for the purchase of SDP pipe among themselves.

39. For the purpose of forming and effectuating and as a part of the aforesaid combination and conspiracy, said defendants did those things which, as hereinabove alleged, they combined and conspired to do, including, but not limited to the following things:

(a) Said defendants and co-conspirators held periodic meetings to tally past orders and to discuss prospective orders for the purpose of allocating prospective orders among said defendants and co-conspirators.

(b) At such meeting and in subsequent telephone conversations said defendants and co-conspirators agreed between and among themselves as to which manufacturer would make the low bid, and what that bid would be, and which manufacturers would submit higher complementary bids not intended to win awards on such jobs.

40. The aforesaid combination and conspiracy in restraint of the interstate trade and commerce in the types of pipe covered by this paragraph of the complaint was carried out in the manner and with the effects described in Paragraphs VI and VII.

41. Since at least 1946 intervenors have acquired substantial quantities of the type of pipe covered in this paragraph of the complaint which have been manufactured by defendants, co-conspirators and others. In acquiring said pipe, intervenors have usually invited formal sealed competitive bids from manufacturers directly or from prime contractors, and they have generally accepted the price offered by the lowest responsible bidder.

42. When acquiring said pipe directly from manufacturers, intervenors have been led and induced by the defendants and co-conspirators as a result of the illegal combination and conspiracy alleged herein, to make contract awards at prices fixed by and influenced by said illegal combination and conspiracy and intervenors have been denied the benefit of free and unrestricted competition in their acquisition of said pipe. By the

operation of defendants' and co-conspirators' agreements and concert of action herein alleged, intervenors have been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

43. When acquiring said pipe through prime contractors, intervenors have been forced to make contract awards on bids or quotes incorporating prices fixed by and influenced by said defendants' and co-conspirators' illegal combination and conspiracy, and intervenors have been denied the benefit of free and unrestricted competition in their acquisition of said pipe. By the operation of defendants' and co-conspirators' agreements and concert of action herein alleged, intervenors have been compelled to pay substantially higher prices than would have been the case but for the violation of the antitrust laws herein alleged.

44. As a result of the alleged illegal combination and conspiracy, intervenors have been injured and financially damaged by the defendants in an amount which is presently undetermined. Intervenors specifically reserve the right to determine the exact amount of their injury and upon such determination or at such other time as the court directs to amend this complaint and set forth in said amendment or whatever other means the court may direct, the exact amount of their injury.

XI
THIRD CAUSE OF ACTION
(Combination and Conspiracy Involving Alternate Small Diameter Pressure Pipe)

45. Beginning sometime prior to 1955 and continuing thereafter until at least January, 1962, the exact dates being unknown to intervenors, the defendants U.S. Steel, Smith-Scott, U.S.I., American and United and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in alternate SDP pipe in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. § 1, commonly known as the Sherman Act.

46. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among said defendants and co-conspirators to allocate and divide alternate SDP pipe jobs so that the manufacturers of steel SDP pipe considered as a group on the one hand and the manufacturers of concrete SDP pipe considered together on the other hand would each obtain an agreed upon percent of all alternate SDP pipe jobs.

47. For the purpose of forming and effectuating the aforesaid combination and conspiracy and as a part thereof, said defendants and co-conspirators did those things, which, as hereinbefore alleged, they combined and conspired to do, including, but not limited to the following:

(a) Tallies were maintained by representatives of each defendant for the purpose of keeping a record of whether a steel SDP pipe manufacturer or a concrete SDP pipe manufacturer obtained each job. Information

needed for such tallies was often obtained at meetings or by telephone conversations between said defendants or co-conspirators.

48. Intervenors here reallege as fully as though here set out Subparagraphs 40 through 44 of Paragraph X.

XII

FOURTH CAUSE OF ACTION

(Combination and Conspiracy Involving Alternate Large Diameter Pressure Pipe)

49. Beginning sometime prior to 1955 and continuing thereafter until at least August, 1962, the exact dates being unknown to intervenors, the defendants American, Kaiser, United and U.S. Steel and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in alternate LDP pipe in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. § 1, commonly known as the Sherman Act.

50. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among said defendants and co-conspirators to allocate and divide solicitations for alternate LDP pipe so that the manufacturers of steel LDP pipe would obtain approximately 50 percent of the orders resulting from said solicitations and the manufacturers of concrete LDP pipe would obtain approximately 50 percent of the orders resulting from said solicitations, the amount of business involved in the lining and coating of the steel LDP pipe by the concrete LDP pipe manufacturers being included in the share to be obtained by the concrete LDP pipe manufacturers.

51. For the purpose of forming and effectuating the aforesaid combination and conspiracy and as a part thereof, said defendants and co-conspirators did those things which, as hereinbefore alleged, they combined and conspired to do, including, but not limited to the following:

(a) Tallies were maintained by representatives of each defendant for the purpose of keeping a record of whether a steel LDP pipe manufacturer or a concrete LDP pipe manufacturer obtained each job. Information needed for such tallies was often obtained at meetings or by telephone conversations between said defendants or co-conspirators.

52. Intervenors here reallege as fully as though here set out Subparagraphs 40 through 44 of Paragraph X.

XIII

FIFTH CAUSE OF ACTION

(Combination and Conspiracy Involving Steel Large Diameter Pressure Pipe)

53. Beginning sometime prior to 1955 and continuing thereafter until at least August, 1962, the exact dates being unknown to intervenors, the defendants Kaiser and U.S. Steel and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in steel LDP pipe in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. § 1, commonly known as the Sherman Act.

54. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among said defendants and co-conspirators, the substantial terms of which were:

(a) To submit collusive and rigged bids for the sale of steel LDP pipe; and

(b) To allocate and divide orders for the purchase of steel LDP pipe among themselves.

55. For the purpose of forming and effectuating the aforesaid combination and conspiracy and as a part thereof, said defendants and co-conspirators did those things which, as hereinbefore alleged, they combined and conspired to do, including, but not limited to the following things:

(a) Said defendants and co-conspirators held periodic meetings to tally orders and to discuss prospective orders for the purpose of allocating prospective orders among said defendants and co-conspirators.

(b) At such meetings and in subsequent telephone conversations said defendants and co-conspirators agreed between and among themselves as to which manufacturer would make the low bid, and what that bid would be, and which manufacturers would submit higher complementary bids not intended to win awards on such jobs.

56. Intervenors here reallege as fully as though here set out Subparagraphs 40 through 44 of Paragraph X.

XIV

SIXTH CAUSE OF ACTION

(Combination and Conspiracy Involving Concrete Pipe)

57. Beginning in or prior to the year 1954 and continuing thereafter until at least August, 1962 and continuing so far as intervenors know to the date of the filing of this complaint the defendants American, United, Utah Pipe and White and co-conspirators engaged in an unlawful combination and conspiracy in restraint of the hereinbefore described interstate trade and commerce in concrete pipe in violation of Section 1 of the Act of Congress of July 2, 1890, as amended, 15 U.S.C. § 1, commonly known as the Sherman Act.

58. The aforesaid combination and conspiracy consisted of a continuing agreement, understanding and concert of action among said defendants and co-conspirators, the substantial terms of which were:

(a) To submit collusive and rigged bids for the sale of concrete pipe;

(b) To allocate and divide orders for the purchase of concrete pipe among themselves; and

(c) To refrain from competing in the manufacture of certain sizes and types of concrete pipe in certain areas where those sizes and types were manufactured by another defendant or co-conspirator.

59. For the purpose of forming and effectuating the aforesaid combination and conspiracy and as a part thereof, said defendants and co-conspirators did those things which, as hereinbefore alleged, they combined and conspired to do, including, among others, the following things:

(a) Said defendants and co-conspirators held periodic meetings to tally past orders and to discuss prospective orders for the purpose of allocating prospective orders among said defendants and co-conspirators.

(b) At such meetings and in subsequent telephone conversations defendants and co-conspirators agreed between and among themselves as to which manufacturer would make the low bid, and what that bid would be, and which manufacturers would submit higher complementary bids not intended to win awards on such jobs.

60. Intervenors here reallege as fully as though here set out Subparagraphs 40 through 44 of Paragraph X.

XV

PRAYER FOR RELIEF

WHEREFORE, intervenors pray as follows:

(1) That the alleged combination and conspiracy among the defendants be adjudged and decreed to be an unreasonable restraint of interstate trade and commerce in violation of Section 1 of the Sherman Act; and

(2) That each of the intervenors have and recover from the defendants judgment for treble the amount of the damages as will be shown by proof under their first cause of action; or

(3) That each of the intervenors have and recover from defendants judgments for treble the amount of their damages as will be shown by proof under each of their alternative causes of action; and

(4) That intervenors have an injunctive decree forbidding the further employment against their interests of those conspiratorial tactics hereinabove set forth; and

(5) That intervenors be awarded their litigation expenses and a reasonable attorneys' fee as required by Section 4 of the Clayton Act (15 U.S.C. § 15); and

(6) That intervenors have such other and further relief as the Court shall deem just and proper.

Dated this 11th day of December, 1969.

VERNON B. ROMNEY
Attorney General State of Utah

MULLINER, PRINCE & MANGUM
Gerald R. Miller
Denis R. Morrill
NESLEN & MOCK
Kent Shearer
/s/ Gerald R. Miller
Special Assistant Attorneys
General State of Utah
Attorneys for Intervenors
206 El Paso Natural Gas Bldg.
Salt Lake City, Utah 84111

Filed: December 12, 1969.

Motion to Intervene as Plaintiffs.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants, City of Grantsville, et al., Applicants for Intervention. Civil No. 69-1964-MP.

Pursuant to Rule 24(a)(2); or in the alternative Rule 24(b)(2) of the Federal Rules of Civil Procedure, the City of Grantsville, City of Sandy, City of Riverton, Town of Perry, Town of Annabella and Salt Lake County Cottonwood Sanitary District move to intervene in the above-entitled action and hereby adopt and incorporate by reference herein the Motion heretofore filed on December 12, 1969, on behalf of Weber Basin Water Conservancy District; Salt Lake County Water Conservancy District; Salt Lake City Suburban Sanitary District No. 1 and others, together with the pleadings in support of that Motion.

DATED this 29th day of December, 1969.

Richard Fox, Esq.
Counsel for City of Grantsville

Glenn C. Hanni, Esq.
Counsel for City of Riverton

O. Dee Lund, Esq.
Counsel for Town of Perry

Tex Olsen, Esq.
Counsel for Town of Annabella

Fred L. Finlinson, Esq.
Counsel for Salt Lake County Cottonwood
Sanitary District

John B. Anderson, Esq.
Counsel for Sandy City

VERNON B. ROMNEY
Attorney General State of Utah

MULLINER, PRINCE & MANGUM
Gerald R. Miller
Denis R. Morrill
NESLEN & MOCK
Kent Shearer
/s/ Denis R. Morrill
Special Assistant Attorneys
General State of Utah
Attorneys for Applicants for
Intervention
206 El Paso Natural Gas Building
Salt Lake City, Utah 84111

Filed December 29, 1969.

[Certificate of Mailing omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

FRED L. MONTMORENCY, being first duly sworn, states that he is the Mayor of the City of South Ogden, Utah, a municipal corporation of the State of Utah. From approximately September of 1958 until the year 1968, the City of South Ogden has purchased significant amounts of concrete pipe from one or more of the defendants in the above-entitled action, their co-conspirators or others at a cost including installation of approximately $531,000.00. Affiant estimates the cost of said pipe, exclusive of installation cost, at approximately $235,000.00.

DATED this 9th day of December, 1969.

/s/ Fred L. Montmorency
FRED L. MONTMORENCY

Executed December 9, 1969.

[Notarial Acknowledgment omitted in printing].

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing].

ROBERT B. HILBERT, being first duly sworn, states that he is Secretary-General Manager of Salt Lake County Water Conservancy District, a public water district organized under the laws of the State of Utah. During the period 1955 through 1964, Salt Lake County Water Conservancy District has purchased approximately 219,000 lineal feet of concrete and steel pipe from one or more of the defendants in the action now pending, State of Utah versus American Pipe and Construction Company; United Concrete Pipe Corporation; Utah Concrete Pipe Company; W. R. White Company; United States Steel Corporation; Kaiser Steel Corporation; Smith-Scott, Inc.; U.S. Industries, Inc., at a cost, exclusive of installation costs, of approximately $1,600,000. During the period 1965 through 1969 Salt Lake County Water Conservancy District has purchased approximately 22,000 lineal feet of pipe at an approximate cost, exclusive of installation cost, of $350,000.

DATED this 9th day of December, 1969.

/s/ Robert B. Hilbert

Executed December 10, 1969.

[Notarial Acknowledgment omitted in printing].

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing].

JOHN J. WHEELWRIGHT, being first duly sworn, states that he is General Manager of the South Davis County Sewer Improvement District, a sewer district organized under the laws of the State of Utah. During the period 1960 through 1961, South Davis County Sewer Improvement District has purchased pipe of the type described in the complaint of the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost, including installation, of approximately $2,500,000.

/s/ John J. Wheelwright

Executed December 10, 1969.

[Notarial Acknowledgment omitted in printing].

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing].

JESSE W. HESS, being first duly sworn, deposes and says:

I am the Secretary-Treasurer of the South Davis County Water Improvement District, a body politic organized and existing under the laws of the State of Utah and have held this position since 1955.

That during the period from 1954 through 1962 the South Davis County Water Improvement District purchased pipe as described in the Complaint on file herein from the above named defendants, co-conspirators, or others at a cost of approximately $392,000.00 exclusive of installation charges.

/s/ Jesse W. Hess
Jesse W. Hess, Secretary-Treasurer
South Davis County Water Improvement District

Executed December 11, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

GOLDEN W. STEWART, being first duly sworn, states that he is Manager of Bountiful Water Subconservancy District, a public water district created under the laws of the State of Utah. During the period 1958 through 1963, Bountiful Water Subconservancy District has purchased approximately 416,156 lineal feet of concrete and steel pipe from one or more of the defendants in the action now pending, entitled State of Utah versus American Pipe and Construction Company; United Concrete Pipe Corporation; Utah Concrete Pipe Company; W. R. White Company; United States Steel Corporation; Kaiser Steel Corporation; Smith-Scott, Inc.; U.S. Industries, Inc. For that pipe Bountiful Water Subconservancy District has paid approximately $1,105,521.00, exclusive of installation costs.

DATED this 15th day of December, 1969

/s/ Golden W. Stewart

Executed December 15, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

WAYNE M. WINEGAR being first duly sworn, states that he is Secretary-Manager of the Weber Basin Water Conservancy District. During the period 1946 through 1964, Weber Basin Water Conservancy District has purchased approximately $1,800,000.00 worth of concrete and steel pipe from one or more of the defendants in the action now pending, State of Utah versus American Pipe and Construction Company; United Concrete Pipe Corporation; Utah Concrete Pipe Company; W. R. White Company; United States Steel Corporation; Kaiser Steel Corporation: Smith-Scott, Inc.; U.S. Industries, Inc. for non-Bureau of Reclamation projects. Approximately $9,000,000.00 worth of pipe has been purchased for Bureau of Reclamation projects.

Wayne M. Winegar

Executed December 15, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

THERON PALMER, being first duly sworn, states that he is General Manager of the Bona Vista Water District, a water district organized under the laws of the State of Utah. During the period 1957 through 1959, Bona Vista Water District purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $450,000, exclusive of installation.

/s/ Theron Palmer

Executed December 16, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

J. ALBERT SMITH being first duly sworn, states he is General Manager of Salt Lake City Suburban Sanitary District No. 2, a sewer district organized under laws of the State of Utah. During the period of 1954 through 1964, said Sewer District purchased pipe of the type described in the complaint in above-entitled action from one or more of the defendants in said action, co-conspirators or others at a cost of approximately $130,256, exclusive of installation.

/s/ J. Albert Smith

Executed December 17, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

CHARLES R. KELLEY, being first duly sworn, states that he is the City Manager of Ogden City, a Municipal Corporation of the State of Utah. During the period of 1946 to 1954, inclusive, Ogden City purchased pipe of the type described in the complaint in the above entitled action from one or more of the defendants named in that action, co-conspirators or others at a cost of approximately $118,464.00, exclusive of installation.

During the period of 1955 through 1964, inclusive, Ogden City purchased pipe of the type described in the complaint in the above entitled action from one or more of the defendants, co-conspirators or others at a cost of approximately $195,930.00, exclusive of installation.

/s/ Charles R. Kelley
CHARLES R. KELLEY, City Manager

Executed December 17, 1969.
[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

Edward H. Southwick, being first duly sworn, states that he is General Manager of the Weber-Box Elder Conservation District, a water district organized under the laws of the State of Utah. During the period 1959 through 1964, Weber-Box Elder Conservation District purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $300,000, exclusive of installation.

/s/ Edward H. Southwick

Executed December 18, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

R. W. Christiansen, being first duly sworn on his oath deposes and says: That he is the coordinator of Nephi City, a municipal corporation of the State of Utah; that he is the person most familiar with the records of purchases of Nephi City from the defendants, or any one of them, named in the above entitled cause; that the only purchases which at this time can be found from any of the named defendants are from the defendant, Utah Concrete Pipe Company;

That the purchases made by Nephi City Corporation, from said defendant were made and paid for on the following dates with the following warrant numbers and in the following amounts, to-wit:

Name	Date	Warrant No.	Amount
Utah Concrete Pipe Co.	7/18/57	2036	$ 9,692.73
Utah Concrete Pipe Co.	8/8/57	2055	6,563.54
Utah Concrete Pipe Co.	10/17/57	2105	537.60
Utah Concrete Pipe Co.	9/9/64	3732	6,290.05
		Total	$23,083.92

and that the total thereof as above is $23,083.92.

That the foregoing is true and correct to the best of my knowledge, information and belief of the affiant; and that he makes this affidavit for and on behalf of Nephi City, a Municipal Corporation.

/s/ R. W. Christiansen
Affiant

Executed December 22, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

CHARLES F. HULL, being first duly sworn, states that he is Mayor of Roy City, a corporation organized under the laws of the State of Utah. During the period February 1, 1956 through January 11, 1965, Roy City purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $103,345.00, exclusive of installation.

/s/ Charles F. Hull
Charles F. Hull, Mayor

Executed December 22, 1969.
[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

HOWARD J. MOODY being first duly sworn, states he is General Manager of Sandy Suburban Improvement District, a sewer district organized under laws of the State of Utah. During the period of 1954 through 1964, said Sewer District purchased pipe of the type described in the complaint in above-entitled action from one or more of the defendants in said action, co-conspirators or others at a cost of approximately $292,-453.23, exclusive of installation.

/s/ Howard J. Moody

Executed December 23, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

L. L. Finlinson, being first duly sworn, states that he is Mayor of Oak City Town Corporation, incorporated under the laws of the State of Utah. During the period 1954 through 1964, Oak City Town Corporation purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $991.86, and during the period 1946 through 1954 at a cost of approximately $1,718.48, exclusive of installation.

/s/ L. L. Finlinson

Executed December 24, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

Jay F. Harmer, being first duly sworn, states that he is Mayor of the Pleasant Grove City Corporation; a municipal corporation organized under the laws of the State of Utah. During the period 1954 through 1964, Pleasant Grove City purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $26,500.00, exclusive of installation.

/s/ Jay F. Harmer

Executed December 24, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

CLARENCE J. STOKER, being first duly sworn, states that he is the City Manager of Clearfield City, a municipal corporation organized under the laws of the State of Utah. During the period 1956 through 1964 said municipal corporation of the State of Utah purchased pipe of the type described in the complaint in the above-entitled action from one or more of the Defendants in the above-entitled action, co-conspirators or others at a cost of approximately $55,649.63, exclusive of installation.

/s/ Clarence J. Stoker
Clarence J. Stoker

Executed December 24, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

FLOYD J. ERICKSON, being first duly sworn, states that he is the District Manager of the North Davis County Sewer District, a Special Improvement District organized under the laws of the State of Utah. During the period 1956 through 1959 said improvement district of the State of Utah purchased pipe of the type described in the complaint in the above-entitled action from one or more of the Defendants in the above-entitled action, co-conspirators or others at a cost of approximately $806,038.00, exclusive of installation.

/s/ Floyd J. Erickson
Floyd J. Erickson

Executed December 24, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

David B. Brinton, being first duly sworn, states that he is General Manager of the Salt Lake City Suburban Sanitary District, a sewer district organized under the laws of the State of Utah. During the period 1954 through 1964, Salt Lake City Suburban Sanitary District purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, or co-conspirators or others at a cost of approximately $1,153,200.00, exclusive of installation.

/s/ David B. Brinton

Executed December 24, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

RANDALL J. HEAPS, being first duly sworn, states that he is the City Recorder of Layton City Corporation, a municipality organized under the laws of the State of Utah. During the period 1959 through 1964, Layton City Corporation purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, conspirators or others at a cost of approximately $61,883.00, exclusive of installation.

/s/ Randall J. Heaps

Executed December 29, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

DON C. PIERCE, being first duly sworn, states that he is the City Recorder of Salem City Corporation, A Municipality, chartered under the laws of the State of Utah. During the period 1946 through 1964, Salem City Corp. purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $105,000.00, exclusive of installation.

/s/ Don C. Pierce

Executed December 29, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

Edward H. Southwick, being first duly sworn, states that he is General Manager of the South Ogden Conservation District, a water district organized under the laws of the State of Utah. During the period 1959 through 1964, South Ogden Conservation District purchased pipe of the type described in the complaint in the above-entitled action, co-conspirators or others at a cost of approximately $140,000, exclusive of installation.

/s/ Edward H. Southwick

Executed December 30, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

J. Bracken Lee, being first duly sworn, states that he is the Mayor of Salt Lake City, a municipal corporation of the State of Utah. During the period 1954 through 1964, Salt Lake City Corporation purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others, at a cost of approximately $3,350,000, exclusive of installation; and during the period 1946 through 1953, Salt Lake City Corporation purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others, at a cost of approximately $1,500,000, exclusive of installation.

/s/ J. Bracken Lee
J. Bracken Lee

Executed December 31, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

ARNOLD ANDERSON, being first duly sworn, states that he is City Manager of the City of Cedar City, a corporation organized under the laws of the State of Utah. During the period 1952 through 1960, Cedar City purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $268,212.00, exclusive of installation.

/s/ ARNOLD E. ANDERSON
Arnold Anderson

Executed December 31, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

HENRY BECKSTEAD, being first duly sworn, states that he is Mayor of the City of Midvale, a corporation organized under the laws of the State of Utah. During the period 1954 through 1964, Midvale City purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $77,387.87, exclusive of installation.

/s/ HENRY BECKSTEAD
Henry Beckstead

Executed December 31, 1969.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

JACK A. RICHARDS, being first duly sworn, states as follows:

I am the Ogden City Attorney. I am also counsel for Bona Vista Water Improvement District. On or about February 19, 1969, I met with Gerald R. Miller and John K. Mangum of the firm of Mulliner, Prince & Mangum. D. Jay Wilson, the Weber County Attorney, was also present at the meeting. Messrs. Miller and Mangum advised us that they had been retained by the State of Utah as Special Assistant Attorneys General in connection with a private treble damage civil antitrust matter involving steel and concrete pipe. The proposed litigation was discussed generally, and I was advised that the State of Utah contemplated a class action on behalf of all of its counties, cities and other governmental entities. The above-entitled action was subsequently filed in the District of Utah, and as the Ogden City Attorney and counsel for Bona Vista Water Improvement District, I relied upon the class action as a means of protecting the interests of the City of Ogden and the Bona Vista Water Improvement District and a procedural vehicle by which their claims could be presented to the Court.

/s/ Jack A. Richards
JACK A. RICHARDS

Executed January 4, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

DAVID B. BRINTON, being first duly sworn, states as follows:

I am General Manager of the Salt Lake City Suburban Sanitary District, a sewer district organized under the laws of the State of Utah. During 1969, I had occasion to discuss the above-entitled case with Gerald R. Miller. He advised me that he had been retained by the State of Utah as a Special Assistant Attorney General to prosecute a private treble damage civil antitrust action involving concrete and steel pipe. In view of the substantial purchases of pipe made by the Salt Lake City Suburban Sanitary District between the years 1954 and 1964, I was, of course, interested in this matter. Accordingly, I made some effort to keep advised as to developments in this case. The Salt Lake City Suburban Sanitary District was relying on the class action which was brought by the State of Utah as a procedural vehicle through which it could present its claims to the Court. Upon receiving notice of the Court's ruling in regard to the class action, the Salt Lake City Suburban Sanitary District promptly authorized the Attorney General of the State of Utah and the attorneys previously retained by him to represent its interest as a named party.

/s/ David B. Brinton
DAVID B. BRINTON

Executed January 4, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

DOREN B. BOYCE, being first duly sworn, states that he is Manager of the Central Weber Sewer Improvement District, a sewer improvement district organized under the laws of the State of Utah. During the period beginning with the calendar year 1956 and ending with the calendar year of 1966, the Central Weber Sewer Improvement District purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $627,000.00, exclusive of installation.

/s/ Doren B. Boyce

Executed January 5, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

RICHARD A. CHAMBERS, being first duly sworn, states that he is Mayor of Logan City, a municipal corporation of the State of Utah. During the period 1947 through 1964, Logan City purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $534,874.74, exclusive of installation.

/s/ Richard A. Chambers

Executed January 8, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

JACK L. CRELLIN, being first duly sworn, states as follows:

I am the Salt Lake City Attorney. On or about February 3, 1969, I met with Gerald R. Miller and John K. Mangum of the firm of Mulliner, Prince & Mangum. At that time they advised me that their firm had been retained and that they had been designated Special Assistant Attorneys General to represent the State of Utah in a treble damage civil antitrust action against certain manufacturers and vendors of concrete and steel pipe. We discussed the contemplated litigation and determined that it would be proper and desirable to file the case as a class action, with the State of Utah representing all members of the class, including Salt Lake City. Subsequently, I have had many conversations with one or more of the attorneys retained by the State of Utah in the above-entitled matter. Most of these conversations were for the purpose of advising Salt Lake City as to the developments in the above-entitled case. I have also assisted the State of Utah in obtaining transaction information from various departments of Salt Lake City. As the Salt Lake City Attorney, I have been aware of the above-entitled case, and I have made an effort to follow its progress. Salt Lake City relied on the class action filed by the State of Utah as the vehicle through which it could present to the Court its claims against these same defendants.

/s/ Jack L. Crellin

JACK L. CRELLIN

Executed January 9, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

NED F. WILSON, being first duly sworn, states that he is the City Recorder of Lehi City Corporation, a municipal corporation organized under the laws of the State of Utah. During the period 1959 through 1963, Lehi City Corporation purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $44,490.00, exclusive of installation.

/s/ Ned F. Wilson
City Recorder

Executed January 12, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

GORDON B. CHRISTENSON, being first duly sworn, states as follows:

I am the Salt Lake County Attorney. On or about February 4, 1969, I met with Gerald R. Miller and John K. Mangum of the firm of Mulliner, Prince & Mangum and Kent Shearer of the firm of Neslen & Mock. These gentlemen advised me that they had been retained by the State of Utah to represent the State in connection with a treble damage civil antitrust action involving the purchase of steel and concrete pipe. I was advised that the State of Utah contemplated a class action on behalf of all of its counties, cities and other governmental bodies. Because of the workload in my office and the lack of expertise in antitrust matters, I determined to rely on the class action which would be brought by the Attorney General as the procedural vehicle through which the claims of Salt Lake County could be presented to the Court. Upon receipt of the notice of the Court's ruling in regard to the class action in the above-entitled case, the Salt Lake County Commission promptly authorized the Attorney General and the Special Assistant Attorneys General retained by him to represent Salt Lake County as a named party in this action.

/s/ Gordon B. Christenson
GORDON B. CHRISTENSON

Executed January 12, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, *et al.*, Plaintiffs, vs. American Pipe and Construction Company, *et al.*, Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

GLENN W. ADAMS, being first duly sworn, states as follows:

I am the lawyer for Central Weber Sewer Improvement District. On or about February 19, 1969, I met with Gerald R. Miller and John K. Mangum of the firm of Mulliner, Prince & Mangum. They advised me that they had been retained by the Attorney General as Special Assistant Attorneys General to represent the State of Utah in connection with a private treble damage civil antitrust action against certain manufacturers and suppliers of concrete and steel pipe. We discussed this matter generally, and I was advised that the State of Utah intended to bring a class action on behalf of all of its counties, cities and other governmental entities. Following that meeting, I had several other conversations with one or more of the attorneys representing the State of Utah. As counsel for Central Weber Sewer Improvement District, I made an effort to keep advised of the developments in the above-entitled case. On various dates I reported on this matter to the trustees of the Central Weber Sewer Improvement District. That district was relying upon the class action brought by the State of Utah and expected in due time to present its claims to the Court as a member of said class.

/s/ Glenn W. Adams
GLENN W. ADAMS

Executed January 13, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, *et al.*, Plaintiffs, vs. American Pipe and Construction Company, *et al.*, Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

Glenn A. Wright, being first duly sworn, states that he is the duly acting and appointed City Engineer for Provo City Corporation, a municipal corporation of the State of Utah. During the period from 1946 to 1954, inclusive, the City of Provo purchased for use in Provo City steel, concrete or a combination of steel and concrete pipe in the approximate sum of $580,000. During the period from 1955 to 1964, inclusive, an additional amount of pipe in the approximate sum of $470,000, of the type of pipe described in the complaint in the above-entitled action purchased by the Plaintiff from the Defendant in the above entitled action. The figures given are exclusive of installation costs or any costs except the direct purchase price.

/s/ Glenn A. Wright
GLENN A. WRIGHT, CITY ENGINEER

Executed January 15, 1970.
[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, *et al.*, Plaintiffs, vs. American Pipe and Construction Company, *et al.*, Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

Buell Bennett, being first duly sworn, states that he is City Manager of the City of Vernal, a corporation organized under the laws of the State of Utah. The City of Vernal purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others in the following periods for the following amounts:

1946 to 1953—$16,031.38
1954 thru 1964—$272,910.19
1965—$48,626.00

/s/ Buell Bennett
Buell Bennett

Executed January 19, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, *et al.*, Plaintiffs, vs. American Pipe and Construction Company, *et al.*, Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

J. C. LINFORD, being first duly sworn, states that he is Chairman of the Central Davis County Sewer District, a sewer district organized under the laws of the State of Utah. During the period 1959 through 1964, Central Davis County Sewer District purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $317,143.05, exclusive of installation.

/s/ J. C. Linford

Executed January 20, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, *et al.*, Plaintiffs, vs. American Pipe and Construction Company, *et al.*, Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

T. JOHN LABRUM, having first been duly sworn, upon oath deposes and says:

1. He is the Manager of the Taylorsville-Bennion Improvement District, and has been so since its creation in 1954.

2. That he is familiar with the purchases of the District with regard to pipe and supplies, and has made a study of the concrete and steel pipe of the District purchased since its inception.

3. That since the year 1954 through the year 1964, inclusive, Taylorsville-Bennion Improvement District has purchased pipe, including manholes, of the type described in the complaint from defendants or others, at a cost of $327,175.56, exclusive of installation.

Dated this 20th day of January, 1970.

/s/ T. John Labrum
T. John Labrum

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, *et al.*, Plaintiffs vs. American Pipe and Construction Company, *et al.*, Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

ROSCOE W. GODFREY, being first duly sworn, deposes and says: That he is the manager of the Salt Lake County Cottonwood Sanitary District, a special improvement district organized under the laws of the State of Utah; that during the period from 1957 to 1964 the Salt Lake County Cottonwood Sanitary District purchased pipe of the type described in the Complaint in the above entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $3,781,378.24, including the cost of installing said pipe in the Sewer Treatment System of said District.

/s/ Roscoe W. Godfrey

Executed January 23, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, *et al.*, Plaintiffs, vs. American Pipe and Construction Company, *et al.*, Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

WILLIAM C. HAGUE, being first duly sworn, states:

1. That he is the General Manager of Metropolitan Water District of Salt Lake City, a separate and independent political corporate entity organized and existing pursuant to Chapter 8, Title 73, U. C. A. 1953, being the Metropolitan Water District Act; and

2. That during the period 1946 through 1953, inclusive, the Metropolitan Water District of Salt Lake City purchased pipe of the type described in the Complaint in the above entitled action from one or more of the defendants in the above entitled action, co-conspirators or others at a cost of approximately $1,537,000.00, exclusive of installation; and

3. That during the period 1954 through 1966, inclusive, the Metropolitan Water District of Salt Lake City purchased pipe of the type described in the Complaint in the above entitled action from one or more of the defendants in the above entitled action, co-conspirators or others at a cost of approximately $263,000.00, exclusive of installation; and

4. That prior to the 13th day of May, 1969 he was advised that the State of Utah would commence an action in the appropriate Federal District Court for itself and in behalf if its agencies, political subdivisions and districts, and in particular the Metropolitan Water District of Salt Lake City, to recover the damages it has sustained by reason of the acts and conduct of the defendants herein; and was further advised that the rights of the Metropolitan Water District of Salt Lake City would be thereby protected; and that in reliance thereon he did not cause to be filed a separate action by Metropolitan Water District of Salt Lake City to recover the damages sustained by it herein.

/s/ William C. Hague

Executed January 30, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, *et al.*, Plaintiffs, vs. American Pipe and Construction Company, *et al.*, Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

JOHN JORGENSEN, being first duly sworn, states that he has been Mayor and Councilman in charge of water for Castle Dale City. During the period 1954 through 1964, and has purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $16,322.70, exclusive of installation.

/s/ John L. Jorgensen

Executed February 13, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit in Support of Motion to Intervene.

United States District Court, Central District of California.

State of Utah, *et al.*, Plaintiffs, vs. American Pipe and Construction Company, *et al.*, Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing].

Walter W. Brock, being first duly sworn, states that he is General Manager of the Granger-Hunter Improvement District, a water and sewer district organized under the laws of the State of Utah. During the period 1953 through 1964, Granger-Hunter Improvement District purchased pipe of the type described in the complaint in the above-entitled action from one or more of the defendants in the above-entitled action, co-conspirators or others at a cost of approximately $702,000, exclusive of installation.

/s/ Walter W. Brock

Executed March 5, 1970.

[Notarial Acknowledgment omitted in printing]

Request for Admission.

United States District Court, Central District of California.

State of Utah, *et al.*, Plaintiffs, vs. American Pipe and Construction Company, *et al.*, Defendants. Civil No. 69-1964-MP.

TO: Plaintiff, STATE OF UTAH, and to GERALD R. MILLER, ESQ. and MULLINER, PRINCE & MANGUM, its attorneys.

Pursuant to Rule 36, F.R.C.P., defendant, United States Steel Corporation, requests plaintiff, State of Utah, within ten (10) days after service of this request, to make the following admission for the purpose of this action only and subject to all pertinent objections to admissibility which may be interposed at the trial:

1. The genuineness of the letter of January 2, 1970, from Gerald R. Miller, Counsel for Plaintiff, to Applicants for Intervention, a copy of which is attached hereto as Exhibit A.

DATED: January 22nd, 1970.

DOMINIC B. KING, ESQ.
Law Department
U. S. Steel Corporation
525 William Penn Place
Pittsburgh, Pennsylvania
and
MUSICK, PEELER & GARRETT
Jesse R. O'Malley, Esq.
Lawrence E. Stickney, Esq.
One Wilshire Boulevard,
Los Angeles, California 90017
Attorneys for Defendant,
UNITED STATES STEEL CORPORATION
BY: /s/ Jesse R. O'Malley
JESSE R. O'MALLEY

EXHIBIT A TO REQUEST FOR ADMISSIONS

[Letterhead omitted in printing]

January 2, 1970

Applicants for Intervention
in the State of Utah Private
Treble Damage Civil Antitrust Case
Involving Steel and Concrete Pipe

Re: *State of Utah, et al. v. American Pipe & Constr. Co., et al.*

Gentlemen:

As you may know, this firm, together with Kent Shearer of Neslen & Mock, were retained by the State of Utah to represent it in connection with the private treble damage civil antitrust case referred to above. We thought it would be well to advise you generally as to the nature of this action and its past history.

The Complaint was filed on May 13, 1969 by the State of Utah on behalf of itself and all others similarly situated. The State brought a class action seeking to represent the interests of all of its governmental entities, including cities, counties and water districts. In addition, the class was defined broadly enough to include the states of Idaho, Wyoming and Nevada. The Complaint alleges violations of § 1 of the Sherman Act. It is based in large part upon previous federal proceedings against many of the same defendants.

On March 10, 1964 a United States Grand Jury sitting in the Southern District of California returned indictments against the defendants American Pipe and Construction Company, United Concrete Pipe Corporation, Kaiser Steel Corporation, United States Steel Corporation, U. S. Industries and Smith-Scott, Inc. charg-

ing them and certain of their officers with conspiring to restrain interstate trade in steel and concrete pipe in that they submitted collusive and rigged bids for the sale of such pipe and allocated and divided business among themselves. On June 19, 1964, pleas of *nolo contendere* were made by all defendants, and judgments of guilt were entered. Upon completion of the criminal cases, the federal government filed civil actions against the same corporate defendants. Subsequently, treble damage antitrust actions were filed by more than 350 plaintiffs, including the states of Hawaii, California, Oregon, Washington and Arizona. Eventually, these cases were consolidated before the Honorable Martin Pence, United States District Judge for the District of Hawaii. This litigation came to be known as the "Western pipe conspiracy cases". Most of the parties involved in the West Coast cases have settled their claims, and their actions have been dismissed. The United States government settled as to each defendant except American on December 8, 1967. A consent judgment was entered against American on May 24, 1968. There are presently some half dozen cases pending before Judge Pence, including the State of Utah case referred to above.

By an order filed December 4, 1969, Judge Pence held that the State of Utah's action could not be maintained as a class action. Following that ruling and by notice dated December 4, 1969, the Attorney General of the State of Utah notified all of the potential members of the class situated in the State of Utah. The Attorney General subsequently received an authorization from each of you requesting his office, or a firm authorized by him, to file requisite pleadings for the purpose of intervening in the above-entitled case. Pur-

suant to your authorization and at the direction of the Attorney General, we prepared and filed a Motion to Intervene on behalf of some 64 applicants.

As matter of form and insofar as we were able to do so, we listed the City Attorney, County Attorney or counsel for each of the separate applicants on the Motion for Intervention; however, the Attorney General of the State of Utah and the Special Assistant Attorneys General who have prosecuted this case for the State were listed as the attorneys for the applicants for intervention. Because we considered time to be of the essence, it was not possible for us to contact each of your usual counsel prior to the time the motion was filed with the Court.

In addition to the Motion to Intervene, we filed a proposed Complaint on Intervention, affidavits in support of the motion, a motion of the State of Utah directed to the previous order of the Court, including a motion to amend the Complaint by joining the applicants for intervention as parties plaintiff, together with a proposed Amended Complaint, and a Memorandum in Support of the Motions filed by plaintiff and the applicants for intervention. Because of the bulk of these pleadings and the expense involved, no attempt was made to send copies to each of the applicants. If you desire copies, we will be happy to prepare them. Otherwise, copies of these pleadings, together with all other documents pertaining to this case, are available for inspection at our office.

In due time, we will receive notice from Judge Pence setting this matter for argument. The hearing on the Motion to Intervene will probably be held in Los Angeles, California. If you have not already sub-

mitted an affidavit in response to our previous letters, please do so. These affidavits indicating the amount of pipe purchases made by each of you must be filed in advance of the hearing.

There are several important legal issues which must be resolved by the Court in connection with the Motion to Intervene. Not the least of our problems concerns the statute of limitations, which probably ran on May 24, 1969. In connection with the statute of limitations, it may be important to determine whether the applicant was aware of the pendency of the above-entitled action prior to the entry of Judge Pence's order in regard to the class action. I appreciate the difficulty of determining knowledge or the lack thereof on behalf of a corporate entity. This matter was reported on at least one television news program at the time the State of Utah filed its Complaint. If the applicant's attorney or engineer or any other officer was aware of the pendency of the State's action, please notify us.

It has come to our attention that certain attorneys for defendants in this matter have contacted some of the applicants and attempted to secure an affidavit indicating that they had no knowledge of the pendency of this action. If you are contacted by one of the defendants or their counsel, please refer them to this office. We request that you do not sign any such affidavits or make any communication with the defendants except upon advice from the Attorney General or

the lawyers which he has retained as Special Assistant Attorneys General.

We shall, of course, advise you of developments in this matter from time to time. If any of you or your usual attorneys desire any further information at any time, please do not hesitate to call this office.

Yours truly,

/s/ Gerald R. Miller
Gerald R. Miller

GRM:cw

[Affidavit of Service omitted in printing]
Filed January 22, 1970.

Points and Authorities of Defendants in Opposition to Motions to Intervene and to Amend.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

I
PREFATORY STATEMENT

The State of Utah, as a result of the Court's ruling that this was not a class action, has filed or caused to be filed four separate motions. Each of these motions is asserted to the Court in separate procedural dress, but all, in effect, ask the Court for the same ruling, i.e., reinstate the class action as to all members of the alleged class that the state has now been able to persuade to join in the action.

The pending motions to permit intervention, or alternatively, to amend the complaint to add additional parties, must be viewed against the statute of limitations questions which underlie such motions. Defendants submit that plaintiff and applicants may not employ either Rule 15 or Rule 24 as a device to avoid the bar of Sections 4B and 5(b) of the Clayton Act. The record herein establishes that applicants have slept on their rights long after the statute has run on their purported claims. Applicants would not be before the Court now if plaintiff had not disturbed their slumber *after* the Court's order on December 3, 1969, that this action should not be maintained as a class action.

Defendants' assertion that plaintiff's and applicants' claims are barred by Sections 4B and 5(b) of the

Clayton Act is based upon the following facts: On March 10, 1964, the United States Government initiated five criminal actions against the defendants and others. Pleas of *nolo contendere* were accepted and judgments were entered in these governmental actions on June 19, 1964. On that day, the criminal proceedings terminated. Four days later, the government filed civil actions under the False Claims Act and Section 4A of the Clayton Act, neither of which could invoke the tolling provisions of Section 5(b). Subsequently, on October 28, 1964, the government amended its complaints to add a claim for injunctive relief under Section 4, which claim is an action " to prevent, restrain, or punish violations of the antitrust laws" and may therefore suspend the running of the four-year statute pursuant to Section 5(b). The government civil actions were terminated as to all defendants therein, except American Pipe and Construction Co., with the entry of consent judgments on December 8, 1967. The filing of the complaint in the present action by the State of Utah in April of 1969 was even more than one year after the termination of the government civil actions in December of 1967, as to all but American Pipe and Construction Co. The government civil cases were not terminated as against American Pipe and Construction Co. until May of 1968. This is the basis of defendants' contention that the statute has run even if it were deemed to have been suspended until May 1968. The tardy character of the pending motions is underscored by the history of this West Coast Pipe Case litigation, which, like the present actions, was based upon the conspiracies alleged in the aforesaid government criminal proceedings. These cases included more than 100 separate actions involv-

ing more than 350 claimants in various jurisdictions; seven were class actions with numerous co-plaintiffs and interveners. All were consolidated in a pretrial discovery program. This mass of claims and claimants constituted one of the classic examples of complex, protracted, multidistrict antitrust litigation which some commentators had feared could not be handled by the federal judiciary, at least not within the lifetimes of the witnesses, litigants and other individual participants.

In order to facilitate administration of this litigation and its orderly progress toward a final disposition, Judge Pence determined that all actual and potential claimants must be brought into the judicial machinery under this administration. The Court's ruling was that prospective interveners in the various class actions must file by March 31, 1966. At that time, during discussion of this cut-off ruling, Maxwell M. Blecher, Esq. of the law firm of Joseph L. Alioto, Esq., who was lead counsel for the plaintiffs, stated the intent and common understanding of the Court's ruling:

> "I think, if it please the Court, that the concept be retained but the date changed, let's say to April 30th, so that everywhere, everyone everywhere situated *would have some knowledge that they're either going to be in by that date or suffer some consequence,* whether we call it a penalty or not."

With respect thereto, the Court made the following statement:

> "This April 15th date is in the interest of justice as I see it, justice to all of those who have not slumbered along or procrastinated along on enforcing their rights. . . ."

More than one year after the cut-off date established by the Court, certain new plaintiffs or interveners had come forward, and the defendants then reasonably assumed that all who were going to sue on the alleged conspiracies had done so. Extensive publicity had been given to the litigation in the states west of the Rockies. At this juncture, a settlement was negotiated between plaintiffs and all but one of the corporate defendants. There has never been any doubt that settlement, as opposed to trial of the actions, was the result which was expected and toward which the Court's efforts were heartily directed. In these negotiations, the financial capacity of the smaller corporate defendants, who had made the majority of the pipe sales upon which the claims were based, was a principal factor in determining the amount of the total settlement figure. These smaller defendants indicated that they had been "bled dry" by the litigation and could no longer afford to maintain a defense. *At the same time,* they simply could not afford to pay their pro rata share of a settlement payment if such payments were to be, in the aggregate, acceptable to plaintiffs. Nonetheless, agreement, both between the settling defendants and between them and the plaintiffs, was finally reached, and a settlement agreement was executed on May 5, 1967, providing for a total payment of $21,275,000 to plaintiffs. Of such amount, approximately $4,000,000 was contributed by defendants United States Steel Corporation, Kaiser Steel Corporation and Martin-Marietta Corporation *in addition* to their pro rata shares of the total. This was done in order to fund the total settlement figure.

In agreeing with their co-defendants to contribute an amount in excess of their pro rata shares, these

defendants acted in the firm belief that all persons, particularly public entities, which had any possible basis for suit and which intended to sue were before the Court so that this settlement would constitute a final disposition of all claims arising out of the conspiracies alleged in the government criminal actions. This belief was based not only upon the history of the cases and the understanding of the participants, but also upon the widespread publicity which had been given to the proceedings and the settlement negotiations, including efforts which had been made by counsel for certain of the plaintiff-governmental agencies to enlist other such plaintiffs in the litigation. (See defendants' affidavits concerning dismissal of the present action.)

Defendants submit that by reason of the foregoing facts, applicants' claims are barred by the statute of limitations and the pending motions under Rules 15 and 25 cannot revive those claims.

II

THE PROPOSED INTERVENERS DO NOT ESCAPE THE BAR OF THE STATUTE OF LIMITATIONS BY EMPLOYING EITHER RULES 15 OR 24 OF THE FEDERAL RULES OF CIVIL PROCEDURE.

The pending motions turn on the effect to be given to Section 5(b) of the Clayton Act, which provides as follows:

> "Whenever any civil or criminal proceeding [singular] *is instituted by the United States* to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, *the running of the statute*

of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding *shall be suspended during the pendency thereof and for one year thereafter: Provided, howevever,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action *shall be forever barred unless commenced either within the period of suspension or within four years* after the cause of action accrued." (emphasis added)

In *Maricopa County v. American Pipe and Construction Co.*,[1] the Court rejected the contention that relation back pursuant to Rule 15(c) would save a claim barred by Section 5(b). The Court stated therein:

> "One caveat, however, is illustrated by the present case. Presupposing that before that one year period of suspension following the termination of criminal actions had ended, i.e., June 19, 1965, the government had filed its same False Claims and § 4A actions (as was here done), and *after* June 19, 1965, the government had then amended its civil actions to add an antitrust injunctive count, this court would have no hesitancy in stating that the insertion of the injunctive antitrust count by amendment would not revive any claims already made moribund by the termination of the one-year extension. 'What is dead, is dead', and an *attempted heart transplant by the relation-back*

[1]303 F.Supp. 77 (D. Ariz. 1969).

theory on amendments under F.R. Civ. P. 15(c) would not revive the cause of action."[2] (emphasis supplied)

When actually presented with an "attempted heart transplant" by means of Rule 15(c), the District Court in *Philadelphia Electric Co. v. Anaconda American Brass Co.*,[3] refused to allow relation back of amendments to override the express legislative language of Section 5(b) of the Clayton Act. The court pointed out:

> "Surely, it was not the intention of the Committee, the Supreme Court, or the Congress that the 1966 amendments to Rule 23 should have any effect upon the period of limitations established by Congress, 15 U.S.C. §§ 15b, 16(b), as amended. Any such purpose would run counter to the statutory prohibition against rules which 'abridge, enlarge or modify any substantive right', 28 U.S.C. § 2072."[4]

Whatever the guise of plaintiff's alternative motions, they constitute an attempt to breathe life into actions barred by the statute and are thus contradictory to the foregoing rule of the *Maricopa County* and *Philadelphia Electric* cases. Moreover, such motions contravene the congressional intent in enacting Section 5(b) of the Clayton Act. Such intent is reflected in the following portion of H.R. No. 422, 84th Cong.

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[2] *Id.* at 86. *Cf. Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co.*, 207 F.Supp. 252, 256 (N.D. Ill. 1962) in which the court stated that when a governmental entity "seeks intervention of right on behalf of plaintiffs' consumers, it is evident that its rights cannot rise above theirs."

[3] 43 F.R.D. 452 (E.D. Pa. 1968).

[4] *Id.* at 460.

1st Sess. 8 (1955) which delineates the congressional intent in enacting Section 5(b) of the Clayton Act:

> "While the committee believes it important to safeguard the rights of plaintiffs by tolling the statute during the pendency of Government antitrust actions, it recognizes that in many instances the long duration of such proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts. *It believes* the provisions of this bill will tend to shorten the period over which private treble damage cases will extend by requiring that the plaintiff bring his suit within 4 years after it accrued or within 1 year after the Government's case had been concluded."

Admittedly, applicants' proposed complaints contain language purporting to plead around the statute of limitations. Each of the complaints under consideration alleges that the purported conspiracy continued to the date of the filing of the complaint herein by the State of Utah. However, the State of Utah, in its memorandum in opposition to defendants' motion to dismiss the class action,[5] and applicants, in their memorandum in support of intervention.[6] have conceded the existence of the problem of the statute of limitations and by so doing, have tacitly conceded that allegations purporting to plead around the bar thereof are spurious. Because the bar of the statute would be dispositive of the pending motions to intervene and to amend

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[5]Memorandum in Support of Class Action, pp. 17-19.

[6]Memorandum in Support of Motions filed by plaintiff and applicants for intervention, p. 10.

the complaint and in view of the prior ruling of this Court that the alleged conspiracies ended in 1962, we respectfully submit that it is now encumbent upon plaintiff and applicants to adduce evidence that the alleged conspiracy complained of herein continued beyond 1962; otherwise, it is apparent that under any test, applicants' purported actions are barred by Section 5(b) of the Clayton Act.

III

THE PENDING MOTION UNDER RULE 15 MUST BE DENIED

Plaintiff seeks to amend its complaint by adding as parties plaintiff various governmental agencies within the State of Utah. It appears that by means of this amendment the agencies hope to utilize plaintiff's May 13, 1969, filing and avoid the bar of the statute of limitations. However, even if plaintiff's amendment were allowed, the claims by the agencies would be barred by the statute inasmuch as an amendment which adds *new* parties—whether plaintiff or defendant—after the statute has run will not relate back to the date of the earlier filing.

Longbottom v. Swaby, 397 F.2d 45, 48 (5th Cir. 1968);

Lewis v. Lewis, 358 F.2d 495, 502 (9th Cir. 1966);

Hoffman v. Halden, 268 F.2d 280, 304 (9th Cir. 1959);

Storey v. Garrett Corporation, 43 F.R.D. 301, 304 (C.D. Cal. 1967);

Monarch Industrial Corp. v. American Motorist Ins. Co., 276 F.Supp. 972, 981 (S.D. N.Y. 1967);

King v. Udall, 266 F.Supp. 747, 749 (D. D.C. 1967);

Martz v. Miller Brothers Company, 244 F.Supp. 246, 249 (D.Del. 1965); and

3 *Moore's Federal Practice*, ¶15.15 [4-1], pp. 1041-1042 and the cases cited at Notes 6, 7 and 8.

See also, *Maricopa County v. American Pipe and Construction Co.*, 303 F.Supp. 77, 86 (D. Ariz. 1969), wherein the court stated:

> "[A]n attempted heart transplant by the relation-back theory on amendments of F.R.Civ.P. 15(c) would not revive the cause of action."

Since the "attempted heart transplant . . . would not revive the cause of action" of the proposed parties, it is apparent that it would serve no purpose to permit plaintiffs to amend to add such parties. Rule 15(c) of the F.R.C.P., which allows "relation back of amendments" in some instances, states:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied, and, *within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits,* and (2) knew

or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." (Emphasis added)

Although Rule 15(c) does not discuss amendments adding parties plaintiff, the Advisory Committee's Notes of 1966 state:

"The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs."[6a]

It is apparent that plaintiff has not and cannot satisfy the requirements of Rule 15(c). Defendant received no notice of the claims by the agencies prior to the time the statute of limitations ran and there can be no claim by plaintiff or the proposed interveners that there is any issue with respect to "a mistake concerning the identity of the proper party. . . ." Clearly, defendants would be prejudiced if claims can be maintained after the running of the statute. Moreover, in order to justify relation back of an amending adding additional parties plaintiff,

"[s]ufficient identity of interest between the original and new plaintiff would have to be shown, so that *the assertion of a wholly new cause of action is not sanctioned; and absence of prejudice to the defendant—the adversary of the party to be joined—would still be a crucial factor.* Al-

[6a] *Moore's Federal Practice* ¶15.01 [9], p. 811.

> though situations which justify relation back of an amendment under *Rule 15*, joining a complete stranger to the original action as plaintiff, will probably be rare, the expansion of *the rule should be significant in persuading courts to permit relation* back of *amendments changing the capacity in which plaintiff brings suit.*[7] (Emphasis added)

Both the general prohibition of relation back and its exceptions are based upon the theory that amendments adding new parties amount to the assertion of new causes of action. To allow such amendments to relate back would, in most instances, destroy the statute of limitations. This is in conflict with the principle that a new defendant cannot be substituted or added by amendment after the statute of limitations has run.

A similar motion to amend a complaint to add new plaintiffs after the statute of limitations had expired was denied in *Iocono v. Anastasio,* 79 F.Supp. 378 (S.D.N.Y. 1948). In *Iocono,* an action was brought by thirty-five specifically named plaintiffs to recover alleged unpaid overtime compensation. The plaintiffs moved for leave to amend a complaint by adding as plaintiffs such other employees of the defendant who may join as plaintiffs in the action before trial. In denying plaintiffs' motion, the court concluded that:

> ". . . It will not suffice that someone else has a pending lawsuit against the defendant sought to be charged, in which similar but neverthelss different and separate claims are alleged, and that though some ignorance or excusable neglect reference to the person seeking to intervene and to his separate and individual claim was wholly

[7] *Id.* at ¶15.15 [4-2], pp. 1051-1052.

omitted. No amount of good excuses or equitable considerations of one sort or another can alter the fact that there is not now pending any action whatever by or on behalf of these individual claimants. Accordingly, the relief prayed for must be withheld. To hold otherwise would be to dispense with the most elementary requirements of due process." *Iocono v. Anastasio,* 79 F.Supp. 378, 382.

A similar holding can be found in *Aarhus Oliefabrik, A/S v. A. O. Smith Corporation,* 22 F.R.D. 33 (E.D. Wis. 1958). This action was originally brought by Aarhus against Smith, to recover damages for an alleged breach of warranty in connection with the sale of certain machinery by Smith to Aarhus. The defense of lack of privity was raised, defendant contending that the sale was made not to Aarhus but to Topsφe, who then resold the machinery to Aarhus. Aarhus sought to amend his complaint by adding Topsφe as an alternative plaintiff. The court denied plaintiff's motion, stating that:

". . . But here, an attempt is made to bring in a separate claim. The original complaint was a suit upon a contract between Aarhus and Smith. The amendment seeks to bring in a suit on a contract between Topsφe and Smith after such suit has been barred or destroyed by running of the statute of limitations. This should not normally be allowed." [Citations omitted]. *Aarhus Oliefabrick, A/S v. A. O. Smith Corporation,* 22 F.R.D. 33, 36-37.

In *Murfkan v. Kahn,* 11 F.R.D. 520 (S.D. Fla. 1951), suit was initiated by plaintiff to recover treble damages under Section 205 of the Housing and Rent

Act of 1947. A motion to add plaintiff's wife as an additional plaintiff, after the statute of limitations had run, was denied. The language of the court in denying the amendment is directly relevant to the issues presented in the case at bar. The policy considerations articulated by that court shed considerable light on the problems facing this court.

> "[A]n amendment will not be allowed if it introduces a new cause of action which as an independent proceeding would be barred by the statute of limitations. * * * Where, as in this case, the right of action is specifically created by the statute and that right qualified by requiring that the action be commenced within a certain time, there is even more reason to require each plaintiff to institute his own suit against the defendant within the time allowed. * * *
>
> "Even though the rights of the original plaintiff and the plaintiff sought to be added arose out of the same transaction and though the cause of action may be the same, an amendment will not be allowed to permit the addition of a party plaintiff after the expiration of the time allowed by statute in which to institute suit." *Murfkan v. Kahn*, 11 F.R.D. 520, 522.

Accord,

Messelt v. Security Storage Co., 14 F.R.D. 507, 513 (D. Del. 1953); and

Kerner v. Rackmill, 111 F.Supp. 150, 151 (M.D. Pa. 1953).

It is only in cases [unlike the instant suit] where the amendment corrects a misdescription of a party actually served or changes the capacity in which a party is su-

ing or being sued, the adverse party has fair notice within the limitations period that a particular claim will be brought against him, and the policy of the statute is fulfilled. Accordingly, relation back is allowed in such instances.

Longbottom v. Swaby, 397 F.2d 45, 48 (5th Cir. 1968);

People of the Living God v. Star Towing Co., 289 F.Supp. 635, 641 (E.D. La. 1968);

Storey v. Garrett Corporation, 43 F.R.D. 301, 304 (C.D. Cal. 1967); and

Martz v. Miller Brothers Company, 244 F. Supp. 246, 249 (D. Del. 1965).

In the present case, the agencies seeking admission as parties plaintiff have no identity of interest with the State of Utah. Their purported claims are based upon entirely different transactions from those upon which the State of Utah seeks to recover and assert a "wholly new cause of action" which is not sanctioned. To allow addition of these agencies after the running of the statute would contravene Rule 15(c) as written and nullify Section 5(b) of the Clayton Act as a statute of limitation. Accordingly, plaintiff's motion to amend must be denied.

Aarhus Oliefabrik v. A. O. Smith Corporation, supra;

Murfkan v. Kahn, supra;

Messelt v. Security Storage Co., supra; and

Kerner v. Rackmill, supra.

IV

THE MOTION TO INTERVENE UNDER RULE 24 SHOULD BE DENIED.

Applicants seek to intervene in the present action as a matter of right pursuant to Rule 24(a)(2), or alternatively, as a matter within the Court's discretion pursuant to Rule 24(b)(2). Applicants cannot meet the requirements of Rule 24(a)(2) or of Rule 24(b)(2). Moreover, applicants' claims are barred by the statute of limitations, and it would serve no purpose to allow intervention for the purpose of asserting barred claims. Accordingly, the motion to intervene should be denied.

(A) *Intervention as a matter of right.*

Applicants cannot meet the requirements of Rule 24(a)(2) which provides:

> "*Upon timely application* anyone shall be permitted to intervene in an action: . . . (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

(1) Interveners' interest.

In order to intervene as of right, applicants must show an interest in the property or transaction which is the subject of this action. They admit that they do not have "an economic interest in the damage which the State of Utah sustained."[9] They argue, however,

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[9]Memorandum in Support of Motions Filed by Plaintiff and Applicants for Intervention, p. 5.

that Rule 24 was liberalized by amendment in 1966 and that recent cases, *Cascade Natural Gas Corp. v. El Paso Natural Gas Co.*, 386 U.S. 129 (1967); *Smuck v. Hobson*, 408 F.2d 175 (D.C. Cir. 1969) and *Nuesse v. Camp*, 385 F.2d 694 (D.C. Cir. 1967), have so broadened the rules regarding the required interest as to include the interests applicants allege herein.

We submit, however, that the standards respecting Rule 24 do not encompass interests such as applicants claim herein. In the *Cascade* case, the Supreme Court allowed the State of California and Southern California Edison Company to intervene in a divestiture suit. The Court found that the purpose of the divestiture suit was to restore competition in the market for natural gas and that the State of California, on behalf of its citizens, and Southern California Edison Company as a large industrial user, had a sufficient interest in the restoration of competition in the geographical area in question to qualify as interveners. In the present action, applicants have no such interest. Their interest is in contravening the clearly defined congressional policy with respect to Section 5(b) as a statute of repose. The United States Government has already obtained criminal judgments on the basis of the conspiracy now alleged by applicants and has obtained injunctive relief against further conspiratorial conduct by defendants. Applicants are clearly not imbued with the purpose which their prayer for injuncture relief might indicate. Their interest is in recovering treble damages and nothing else.

Similarly, in *Smuch v. Hobson*,[10] the court found that parents of children in segregated schools have

[10]408 F.2d 175 (D.C. Cir. 1969).

sufficient interest in the education of their children to justify intervention in a suit already begun by school board officials. In *Nuesse v. Camp*,[11] the Wisconsin Banking Commissioner was allowed to intervene in a suit by a state bank to enjoin the United States Comptroller of Currency from authorizing a national bank to open a branch where state law would not permit branch banking by state banks. In both these cases, and in *Cascade*, the interveners were attempting to implement important and well-defined public policies. In the present action, applicants merely wish to make use of the State of Utah's earlier filing date in hope of avoiding the bar of the statute of limitations.

(2) Timeliness.

Rule 24(a)(2) requires that applicants to intervene be timely.

> See, *United States v. Blue Chip Stamp Co.*, 272 F.Supp. 432, 435 (C.D. Cal. 1967); and *Basle Theatres v. Warner Bros. Pictures Distrib. Corp.*, 24 F.R.D. 476 (W.D. Pa. 1959).

The complaint herein has been pending since May 13, 1969. Applicants did not seek to intervene until they were solicited by plaintiff *after* the Court's December 3, 1969, ruling with respect to the class action. This fact alone requires that intervention be denied on the issue of timeliness. We submit that applicants are guilty of the ultimate failure to comply with the requirement of timeliness in that they deferred their motion to intervene until a date after the statute of limitations had run against their claims. (See discussion concerning the statute of limitations, Point II, *supra*.) Applicants' motion is untimely not only with respect to the

[11] 385 F.2d 694 (D.C. Cir. 1967).

statute of limitations, but also with respect to the history of the West Coast Pipe Cases. Applicants' claims are based upon the same conspiracies alleged in the West Coast Pipe Cases. As this Court's decision on defendants' class action motion points out,[12] applicants had more than an adequate opportunity to join the West Coast Pipe Cases during the lengthy period of that litigation. Applicants' failure to join that litigation or to join the present action before the running of the statute of limitations renders the motion to intervene untimely, and for this reason alone, intervention must be denied.

Mullins v. DeSoto Securities Co., 2 F.R.D. 502 (W.D. La. 1942);

Lockwood v. Hercules Powder Co., 7 F.R.D. 24 (W.D. Mo. 1947).

(3) Prejudice to defendants.

If a prospective intervenor could relate its claim back to a date which would escape the bar of the statute of limitations, the utmost prejudice would accrue to each of the defendants. In this connection, *Maricopa County v. American Pipe and Construction Co.*,[13] held that defendants are badly harmed by the failure of the statute to run as to them. It is well settled that where prejudice would accrue to defendants by reason of the motion to intervene, it must be denied and particularly, where there are compelling equities in favor of defendants and against plaintiffs.

See, *Carpenter v. Wabash Ry.*, 103 F.2d 996 (8th Cir. 1939);

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[12]Decision on Defendants' Motion Opposing the Class Action, pp. 3-4.

[13]303 F.Supp. 77, 87 (D. Ariz. 1969).

Strickler Eng'r Corp. v. Michael Flynn Mfg. Co., 23 F.R.D. 12 (E.D. Pa. 1958);

Kimberly Knitwear v. Hall, 20 F.R.D. 145 (S.D.N.Y. 1957); and

United States v. Loew's Inc., 20 F.R.D. 423 (S.D. N.Y. 1957).

See also,

Foman v. Davis, 371 U.S 178, 182 (1962);

Graves v. General Insurance Corporation, 412 F.2d 583, 585 (10th Cir. 1969);

Dalweld Co. v. Westinghouse Elec. Corp., 9 F.R.Serv.2d 15a. 32, Case 3.

3 *Moore's Federal Practice*, ¶ 15.15[4-2], pp. 1051-52.

(B) *Permissive Intervention*

Rule 24(b)(2) provides for permissive intervention as follows:

> "Upon timely application anyone may be permitted to intervene in an action: . . . (2) when an applicant's claim or defense and the main action have a question of law or fact in common. . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

Even if applicants' claims have a question of law or fact in common with the existing action, and this Court's decision[14] casts doubt with respect thereto, permissive intervention is a matter to be decided in the

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[14]Decision on Defendantss' Motion Opposing Class Action, pp. 5-6.

sound discretion of the court, taking into account the timeliness of the application and potential prejudice to existing parties. As set out above, both of these considerations require that the court deny the application to intervene.

(C) *Relation Back and the Statute of Limitations.*

As stated above, *Maricopa County v. American Pipe and Construction Co.*, held that the statute of limitations on the claims now asserted by applicants ran on May 24, 1969. Inasmuch as applicants did not file their Motion to Intervene until December 11, 1969, applicants' claims are now barred, and it would be an idle act for the Court to grant the motion to intervene.[15] As stated in *Kam Koon Wan v. E. E. Black, Ltd.*, 75 F.Supp. 553, 564 (D. Hawaii 1948):

> ". . . Under ordinary rules, since the filing of a petition to intervene marks the introduction of a new party and a new cause of action the situation is measured for the purposes of the statute of limitations as of the date it was filed. If that date was not within the time limited, the intervention is barred."

Although some cases (based on facts not involved herein) have held that filing of a class action tolls the statute as to subsequent intervening class members, it is clear that where the class aspect of the action is subsequently dismissed, the would-be class members do not get the benefit of the earlier filing. The rule of law is that the statute is not tolled and intervener claims

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[15] *Robertson v. Alaska Juneau Gold Mining Co.*, 61 F.Supp. 265 (N.D. Cal. 1945) *rev'd* on other grounds, 157 F.2d 876.

are barred by the statute. As the court in *Philadelphia Electric Co. v. Anaconda American Brass Co.*,[16] stated:

> ". . . [W]here the determination is negative, and a class action is, in the words of the Committee, 'stripped of its character as a class action' (39 F.R.D. at p. 104), it does not necessarily follow that the case must be treated as if there never was an action brought on behalf of absent class members.
>
> "*If the reason for the negative determination is failure* to meet the prerequisites of 23(a) or even if the reason is that the common questions do not predominate over individual questions under *23(b)(3)* it would seem reasonable to conclude that such *negative determination* also relates back to the filing of the *complaint*. If there never really was a class to be represented, members of the purported class can scarcely be heard to claim that they started suit, vicariously, before the limitations period expired. But if the reason for the negative determination stems from a weighing of various considerations of judicial housekeeping, it may well be that the decision should not relate back to the commencement of the action, and that, at the very least, an opportunity should be presented for proof of reliance upon the pendency of the purported class action sufficient to toll the statute of limitations. Any other approach would make it virtually mandatory for every class member to file a cautionary separate action within the limitations period."

The *Philadelphia Electric* case is dispositive of the present motions to intervene. The purported class in

[16] 43 F.R.D. 452, 461 (E.D. Pa. 1968).

the present action was dismissed by the Court because the purported class did not meet the basic requirements of Rule 23(a). As the Court's decision stated:

> "What *is* fatal to plaintiffs' class action allegations are the raw facts of the past five years litigation on almost precisely the same facts and problems of law set forth in plaintiffs' complaint. . . . From prior actual experience in like cases involving the same alleged conspiracy, this court could not find that number so numerous that joinder of all members was impracticable, nor can it conclude that a class action here would achieve economies of time, effort and expenses or promote any more uniformity of decision than the joinder method heretofore proved successful. To the contrary, the fact of joinder and intervention has made the determination of actual parties plaintiffs and defendants, as well as the percentage of damage determination, much simpler, easier and more practicable than would have been any class action procedure under the present Rule 23(b)(3).
>
> "The court therefore finds that *the first prerequisites to a class action have not and cannot here be met.* Defendants' motion that this action not be maintained as a class action is GRANTED."[17] (Emphasis added).

Therefore, there never really was a class to be represented; there was no "vicarious" filing by the State of Utah, and applicants' claims are barred by the statute of limitations. This outcome is not dictated by legal

[17]Decision on Defendants' Motion Opposing Class Action, pp. 6, 8.

fiction regarding class actions; it is based upon reason and logic. If a party could toll the statute of limitations on behalf of future interveners by merely alleging a bogus class action, the statute of limitations would be nullified. *Philadelphia Electric* sets out the only practical method of dealing with this problem: if there was a class, interveners should receive the benefits of the earlier filing; if there was no class, mere allegations thereof should have no effect on the statute of limitations.

V

MOTION TO VACATE THE COURT'S ORDER CONCERNING THE CLASS ACTION SHOULD BE DENIED.

It is elemental that a prerequisite to maintenance of a class action under Rule 23(a)(1) is that "the class is so numerous that joinder of all members is impracticable, . . ." In this connection, the Court also found in paragraph 2 of its order of December 3, 1960, specifically as follows:

> "The entities alleged by plaintiff to be members of the class described in the Complaint, in fact, are not so numerous that joinder of all such entities is impracticable."[18]

Although plaintiff seeks to vacate the Court's order concerning the class action, it is significant that plaintiff has made no showing that the class is so numerous that joinder of all members is impracticable and has established no facts to show that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. We, therefore,

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[18]Findings of Fact and Order Respecting Class Action, p. 2.

submit that plaintiff has established no basis for vacating the Court's order of December 3, 1969, and the case is squarely within the rule stated in *Polakoff v. Delaware Steeplechase and Race Ass'n.*,[19] as follows:

> "Actually the plaintiffs herein represent only themselves. Accordingly, a dismissal of the [class] action will in no way prejudice other members of the class unless they could claim prejudice by reason of the bar of the statute of limitations since they have failed to heretofore intervene. If such a bar does exist, it is the result of their lethargy and indifference and not of the breach of any duty, moral or otherwise, on the part of the plaintiffs or the Court to awaken them from their slumber."

We shall not reiterate the arguments heretofore made to the Court in our prior briefs, but on the basis thereof, on the Court's own findings and on the affirmation thereof in the factual showing by plaintiff and applicants with the pending motions, it appears conclusively that the Court's order is wholly correct and should not be vacated.

VI

THIS ACTION SHOULD NOT BE CERTIFIED PURSUANT TO 28 U.S.C. § 1292(b).

Plaintiff has moved to certify for appeal, pursuant to 28 U.S.C. § 1292(b), the question of whether the present action should be maintained as a class action. We submit that plaintiff's request for certification pursuant to the foregoing statute contravenes the intent thereof as well as the intent which underlies the

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[19]264 F.Supp. 915 (D. Del. 1966).

enactment of Rule 23, F.R.C.P. Plaintiff has failed to establish that there are controlling questions of law the immediate determination of which materially advance the ultimate termination of the litigation. Furthermore, Rule 23 requires the District Court, in every action in which a class action is alleged, to determine as soon as practicable whether the action is to be maintained as a class action. Thus, the question which plaintiff would have the Court certify is not a unique or controlling question of law, but is one which must be determined in every action in which a class is alleged. Indeed, as stated by the court in *City of New York v. International Pipe & Ceramics Corp.*:[30]

> "The key words of Rule 23 are 'fair and efficient adjudication.' . . .
>
> "[1] In resolving these countervailing situations, the judgment of the trial judge should be given the greatest respect and the broadest discretion, particularly if, as here, he has canvassed the factual aspects of the litigation."

We therefore respectfully submit that in view of the broad discretion which inheres in the trial court in every determination which must be made pursuant to Rule 23 of the F.R.CP., the determination of this Court at issue herein is discretionary and is not subject to certification pursuant to Section 1292(b).

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[30]410 F.2d 295, 298 (2d Cir. 1969).

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that each of the pending motions must be denied.

DATED: January 22nd, 1970.

Respectfully submitted,

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Filed January 22, 1970.
[Affidavit of Service omitted in printing]

Affidavit of Oliver F. Green, Jr., in Opposition to Motion to Intervene as Plaintiffs or in the Alternative, to Amend the Complaint to Add Additional Parties.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

OLIVER F. GREEN, JR., being first duly sworn, deposes and says that:

I am one of the attorneys for U.S. Industries, Inc. (hereinafter "USI"), a defendant herein.

1. I am now, and at all times prior to March 1964 have been, one of the attorneys representing USI in connection with both the United States Government criminal actions as well as all the civil actions against this defendant, frequently referred to as the "West Coast Pipe Case litigation."

2. Despite the allegations of the proposed complaint in intervention that USI has been engaged in the manufacture and sale of pipe and has participated in the alleged conspiracy since at least 1958 to the date of the filing of the complaint, USI did on or about December 20, 1963, sell its pipe plant which was known as its Tubular Products Division to American Pipe & Construction Co. (Complaint, p. 6, para. 9[h]; p. 9, para. 24).

3. The sale by USI of its pipe manufacturing plant and USI's ceasing to engage in the manufacture and sale of pressure pipe has been a matter of public

knowledge since early January 1964. In fact, on December 21, 1964, the United States Government filed, in the United States District Court for the Central District of California, Civil Action No. 64-1775-MP entitled "United States of America, Plaintiff, vs. American Pipe and Construction Co. and U.S. Industries, Inc., Defendants" alleging the fact of said sale and seeking to have the Court set aside said sale pursuant to Section 7 of the Clayton Act.

4. The filing of Action No. 64-1775-MP is reported in 5 CCH Trade Regulation Reporter, page 52,-582 (Case 1838).

5. USI, having been out of the pipe business with respect to which the complaint in intervention relates for more than 6 years, will suffer prejudice if the Court does not deny the Motion to file the complaint in intervention by reason of the following facts:

(a) Upon the sale of its pipe manufacturing plant in December 1963, all employees at the pipe plant, excepting one, ceased to be employees of USI.

(b) The one employee formerly employed at the pipe plant was the controller of the pipe plant and was not involved in the manufacture, sale or distribution of the product. To the best of my recollection, said employee, whose employment at the pipe plant commenced in or about 1960, had never previously been employed in connection with any pipe manufacturing operation.

(c) Since the sale of the pipe plant, USI's records pertaining thereto have become widely scattered and some may have been lost. Certain records were deposited in the Document Depository. Other records, the nature of which is unknown to me, were forwarded for

storage to a warehouse in New Jersey. Certain other records have been maintained at affiant's offices. In addition, other records, the nature and content of which is not known, were left at the pipe plant. By reason of the passage of time the records pertaining to USI's operation of the pipe plant from its acquisition in October 1955 to its sale in December 1963, are not located in any central storage area. In addition, USI now has no employee who is familiar with either the content of or the location of all of the records once maintained at its pipe plant.

(d) On or about May 5, 1967, USI entered into a settlement agreement which disposed of all then pending West Coast Pipe Case litigation between plaintiffs and the settling defendants. In early 1967, when it became apparent that the settling defendants and plaintiffs would settle the cases, USI terminated the services of non-lawyer personnel which it had retained in connection with the case, including the out-of-state economic expert and his assistants whom USI had retained to prepare its economic defense. By reason thereof, the economic studies then underway were never completed. The preparation of a meaningful economic defense to the proposed complaint in intervention could only be accomplished at a tremendous expense to USI, much of which expense would be duplicative of the expenses previously incurred prior to the settlement agreement of May 5, 1967.

(e) USI entered into the settlement agreement of May 5, 1967, in the belief that the notoriety given to the West Coast Pipe litigation had resulted in all persons who had claims against the defendants having appeared before the Court and in the further belief

that all other potential or contingent claimants had reached a decision that their potential or contingent claims lacked merit and in the further belief that the settlement agreement represented an end to the long and expensive litigation.

6. To grant intervenors' Motion after USI has been out of the pipe business for 6 years, after it spent more than $2,000,000 in the defense and settlement of the West Coast Pipe cases, after its books, records and documents necessary for the defense of the action have become scattered, misplaced or lost, after the preliminary work by its economic expert and his staff has been rendered useless by the passage of time, and after the witnesses necessary to USI's defense have scattered, would permit the laggards to profit by their delay at the expense of and to the prejudice of defendants.

The long history of this litigation does not require that ". . . the last shall be first."

/s/ Oliver F. Green, Jr.
OLIVER F. GREEN, JR.

Executed January 22, 1970.
[Notarial Acknowledgment omitted in printing]
[Affidavit of Service omitted in printing]
Filed January 22, 1970.

Affidavit.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

Haldor T. Benson, being first duly sworn, deposes and says:

1. I am one of the attorneys for Utah Concrete Pipe Company, one of the defendants in the above captioned case.

2. It came to my attention and the attention of counsel for the other defendants in this matter that the Utah State Attorney General's office, following the entry of the order that this case not be maintained as a class action, was attempting to have other political subdivisions of the State of Utah intervene in this case.

3. On December 30, 1969, I contacted the attorneys for two of such political subdivisions, namely the City Attorney for Springville City and the City Attorney for the City of Nephi. The purpose in my contacting these City Attorneys was to determine the date on which they had first been advised of this lawsuit by any representative of the State of Utah. I advised each of these City Attorneys that I would like to obtain an Affidavit from the appropriate office of each city, which Affidavit would recite the date of the first contact.

4. The City Recorder for Springville City advised that the first contact with the city came in the form of a "Notice" dated December 4, 1969. He executed an Affidavit to that effect to which a copy of the "Notice" is attached. Said Affidavit is attached hereto as Exhibit "A" and incorporated herein by reference.

5. The City Attorney for Nephi City and the City Coordinator for Nephi City both advised me that said December 4 "Notice" was the first contact that Nephi City had received to the best of their knowledge. The City Attorney, however, declined to have an Affidavit to that effect signed on behalf of Nephi City until he had conferred with the Attorney General's office. I encouraged him to make what ever inquiry he wished. In his letter to me dated December 31, 1969, the Nephi City Attorney further advised: "After checking with the Attorney General's office, I decided that a representative of Nephi City should not sign the Affidavit which you left." A copy of that letter is attached hereto as Exhibit "B" and incorporated herein by reference.

Dated this 20th day of January, 1970.

/s/ HALDOR T. BENSON
Haldor T. Benson

Executed January 20, 1970.

[Notarial Acknowledgement omitted in printing]

EXHIBIT "A" TO AFFIDAVIT OF HALDOR T. BENSON

United States District Court, Central District of California, Civil No. 69-1964-MP.

[Title omitted in printing]

AFFIDAVIT

[Jurat omitted in printing]

Verl S. Dallin, being first duly sworn, deposes and says:

1. I am employed by Springville City, in the capacity of City Recorder, and have been employed by Springville City since March 15, 1950.

2. To the best of my knowledge, information and belief, no representative of the State of Utah ever contacted any representative of Springville City in regard to the above captioned lawsuit prior to the receipt of the "Notice" dated December 4, 1969, a copy of which is attached hereto and incorporated herein by reference.

Dated this 30th day of December, 1969.

/s/ Verl S. Dallin

Executed December 31, 1969.

[Notarial Acknowledgment omitted in printing]

ATTACHMENT TO AFFIDAVIT OF VERL S. DALLIN

NOTICE

THIS NOTICE MAY BE CRITICAL TO YOUR INTERESTS.

If you have purchased steel pipe or concrete pipe for the conveyance of water or sewage subsequent to 1946, you will be particularly interested.

There is considerable evidence that many such purchases were made at artificially high prices resulting from a price fixing conspiracy among suppliers.

Not only have federal criminal actions resulted in convictions of certain of these suppliers, but civil actions in other western states have resulted in cash settlements to units of government of approximately 30 million dollars.

Since you had not filed suit on your own behalf and the limitation period was about to expire, in an effort to protect your interest along with the State's interest, this office sought to bring a class action in a civil suit filed against suppliers in the United States District Court.

We have now, however, received a ruling from the District Judge that our office cannot represent you without your specific authorization. This ruling was unexpected inasmuch as other states had been able to include their political subdivisions in a class action. This means that, as the case now stands, you are out of court.

There is a possibility, despite this, that your rights can still be protected. For us to help you do this, it will require that your governing board immediately execute the enclosed resolution and return it to this office within the next six days because statute of limitations problems are paramount.

The other information we will need can be put together later, but the authorization cannot wait. This is an emergency and you must act at once if you wish to assert a legal claim.

DATED December 4, 1969.

/s/ Vernon B. Romney
VERNON B. ROMNEY
Attorney General

ATTACHMENT TO AFFIDAVIT OF VERL S. DALLIN

AUTHORIZATION TO REPRESENT

The undersigned governmental entity does hereby request and authorize the Attorney General of the State of Utah, or any attorney or firm authorized by him, to represent it and to file requisite actions, motions or appeals for the purpose of intervening on its behalf in the case of *State of Utah v. American Pipe and Construction Company; United Concrete Pipe Corporation; Utah Concrete Pipe Company; W. R. White Company, United States Steel Corporation; Kaiser Steel Corporation; Smith-Scott, Inc.; U.S. Industires, Inc.*, Case No. C 177-69, now pending in the District Court for the United States, Central District of California, on pretrial transfer from the District of Utah, or any corollary, or to file an independent action if he deems that course of action advisable.

The undersigned does hereby also agree to pay a pro rata share of the actual and necessary expenses of the action provided that our express authorization shall be required for any commitment on our part in excess of a total of $500.00.

DATED .....

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EXHIBIT "B" TO AFFIDAVIT OF HALDOR T. BENSON

[Printed Letterhead of Nephi City Corporation omitted in printing]

December 31, 1969

Haldor T. Benson
Attorney at Law
141 East First South
Salt Lake City, Utah 84111

Re: State of Utah vs. American Pipe Co. et al.
Civil No. 69-1964 MP
C-177-69 Anti-Trust case

Dear Mr. Benson:

Thank you for calling at my office last Monday. After checking with the Attorney General's office, I decided that as a representative of Nephi City [I] should not sign the affidavit which you left. For further information, please contact Mr. Bob Hansen with the Attorney General's office.

Best wishes for the New Year.

Very truly yours,

/s/ UDELL R. JENSEN,
Udell R. Jensen,
Nephi City, Attorney

URJ:al

CC: Mr. Vernon B. Romney, Attorney General
Mulliner, Prince & Mangum, Lawyers
Nephi City Recorder

[Affidavit of Service omitted in printing]

Filed January 22, 1970.

Supplemental Memorandum of Utah Concrete Pipe Company in Opposition to Motions to Intervene And to Amend.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

FACTUAL BACKGROUND

Utah Concrete Pipe Company ("Utah Concrete"), joined in the Memorandum of Points and Authorities filed January 22, 1970, by the defendants in opposition to the pending motions to intervene and to amend. This supplemental memorandum is required by facts that were discovered subsequently. On January 21, 1970, the day prior to the filing of the defendants' Points and Authorities, Utah Concrete's attorneys received plaintiff's Answers to the defendants' "transaction" interrogatories. They were reviewed, and a program was established to complete the verification procedure provided for in the Court's order of December 9, 1969.

The first step in the verification program necessarily involved a review of the records of Utah Concrete to determine the procedures that would be followed. As explained in the Affidavit of Amos Clements, which is filed herewith, the books and records of Utah Concrete are his responsibility; and the task of performing the verification of the plaintiff's answers became his responsibility. On or about February 3, 1970, the fact became apparent that Utah Concrete had no records for a major part of the time period covered by plaintiff's answers. Plaintiff's alleged transactions ex-

tend from 1946 through 1969. Utah Concrete has no business records with which to verify any transactions that allegedly occurred prior to January, 1963.*

PREJUDICE TO UTAH CONCRETE

The substantial and unfair prejudice that will result to Utah Concrete from granting any of the pending motions is obvious. Utah Concrete Pipe Company has never been a party to, or named in any of the West Coast pipe cases, upon which this case is founded. (Charles Ward Affidavit, January 16, 1969). There has been no reason for it to maintain aging business records longer than needed for business and tax purposes. This it has done. Its records are believed to be substantially complete to January 31, 1965, and have been maintained to January 1, 1963, although differently organized. (Amos Clements Affidavit.) Yet it now finds itself faced with the impossible task of trying to defend itself against alleged illegal transactions which allegedly occurred as long ago as the date of its organization in 1952.

The prejudice to Utah Concrete from being challenged by the present plaintiff, alone, on transactions extending over an 11-year period (1952-1963), for which it has no records to document a defense, is real. If the sixty-odd proposed interveners were permitted to come into this suit under any of the procedural guises employed, and press their overly-stale claims, the prejudice would be multiplied accordingly.

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*Utah Concrete Pipe Company was organized on January 31, 1952; hence, it is not involved in the transactions alleged by plaintiff prior to that date.

The substantial and unfair prejudice stemming from this unavailability of business records is yet another example of the prejudice to the defendants that would result from the approval of any of the motions to amend or intervene. Such prejudice is certain to be the fate of all of the defendants in numerous additional ways. This is made abundantly clear in the defendants' Memorandum of Points and Authorities in Opposition to the Pending Motions to Intervene or to Amend. Said Memorandum also demonstrates the propriety of denying the pending motions under the Rules, Statutes and Cases in Point.

Dated this 6 day of February, 1970.

Respectfully submitted,

VAN COTT, BAGLEY, CORNWALL & McCARTHY

/s/ Haldor T. Benson
Haldor T. Benson

/s/ James R. Amschler
James R. Amschler
Attorneys for Defendant,
Utah Concrete Pipe Company

[Certificate of Service omitted in printing]

Affidavit.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

[Jurat omitted in printing]

Amos Clements, being first duly sworn, deposes and states as follows:

1. I am employed by Utah Concrete Pipe Company in the position of Office Manager. My office is located in the principal office of Utah Concrete Pipe Company at 379 17th Street, Ogden, Utah. I began my employment with Utah Concrete Pipe Company on November 9, 1961, and have held the position of Office Manager at the above office since June, 1964.

2. As Office Manager, the accounting records and other business records of Utah Concrete Pipe Company are under my direct supervision and control. I have the responsibility for their correct preparation, maintenance and storage.

3. On or about January 26, 1970, I received from Mr. Charles Ward, the President of Utah Concrete Pipe Company, a copy of the State of Utah's Answers to Interrogatories, which specify the alleged transactions that the state relies upon in support of its complaint in this action. I was requested to undertake to verify, from the records of Utah Concrete Pipe

Company, the data listed in said answers to the extent that such verification could be accomplished.

4. A thorough and complete search of all of the accounting and other business records of Utah Concrete Pipe Company disclosed that Utah Concrete Pipe Company has no business records from which any of the alleged transactions listed by the state as occurring prior to January 1, 1963, can be verified. All such records have been discarded or destroyed in accordance with Utah Concrete Pipe Company's records retention program, since they had ceased to serve any business purpose. All of such records were discarded or destroyed prior to the commencement of the above captioned lawsuit. Upon the filing of this lawsuit, Utah Concrete Pipe Company's records retention program was suspended, and no records have been discarded since that time. Utah Concrete Pipe Company's records are believed to be substantially complete to January 31, 1965, and have been maintained, although organized in a different form, to January 1, 1963.

Dated this 6th day of February, 1970.

/s/Amos Clements

Executed February 6, 1970.

[Notarial Acknowledgment omitted in printing]

Affidavit of Dominic B. King.

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

D. B. King, being duly sworn, deposes and says that:

1. I am one of the attorneys for U.S. Steel (hereinafter referred to as "USS"), a defendant herein. I have had accounting personnel of USS examine in detail the claims submitted by the Department of Highways of the State of Utah submitted in response to defendants' transaction interrogatories. No other state agency of Utah has submitted any answers to these transaction interrogatories. All answers of the Department of Highways claim purchases only of concrete pipe. No steel pipe purchases are claimed and no alternate steel was provided in any of the claimed purchases.

2. An examination of USS records shows that USS has identified only one sale of water pipe to the State of Utah during the entire period January 1, 1953, to December 31, 1965. The bid date for this job was March of 1959, and the total amount of the sale for the pipe was $842.

3. In handling the defense of the west coast pipe cases, USS established a task force made up for most of the period of time from 1964 until settlement of the cases in 1967 of up to 13 full-time people, plus part-time help, consisting of accounting and secretarial help. This group worked exclusively on the assembly of records and accumulation of the voluminous data

involved in those cases. Records for USS were accumulated from several different plant locations and district offices as well as the record retention headquarters of USS at Annandale, Pennsylvania, and assembled at the Maywood Plant of USS in Los Angeles during the pendency of the west coast pipe cases.

After the settlement of these cases in May of 1967, this entire task force was disbanded with 11 of the 13 members of the task force either having retired, quit, or been laid off and the records have been sent back to the appropriate plant or office locations or the record retention headquarters of USS.

4. USS engaged in the same economic preparation for defense of these cases as outlined in the affidavit of Oliver F. Greene of January 22, 1970. The reinstitution of a meaningful economic defense preparation by USS could only be accomplished at great expense to USS, much of it being a duplication of expenses previously incurred prior to the May 5, 1967, settlement, and with great effort in reassembling records and personnel to work on such matters.

/s/ D. B. King
D. B. King

Executed February 24, 1970.
[Notarial Acknowledgment omitted in printing]
[Affidavit of Service omitted in printing]
Filed March 3, 1970.

Decision on Motions to Intervene, Amend, Etc.

United States District Court, Central District of California.

State of Utah, on behalf of itself and all others similarly situated, Plaintiffs, v. American Pipe and Construction Company, United Concrete Pipe Corporation, Utah Concrete Pipe Company, W. R. White Company, United States Steel Corporation, Kaiser Steel Corporation, Smith-Scott, Inc., U.S. Industries, Inc., Defendants. Civil No. 69-1964-MP.

The motions before this court are but sequelae of this court's decision and order of December 17, 1969, 49 F.R.D. 17, that this Sherman 1 antitrust case, filed as a class action by the State of Utah under Rule 23(b)(3), F.R.Civ.P., was not to be so maintained. As indicated in that prior ruling, Utah filed this Sherman 1 antitrust suit on May 13, 1969, just eleven days before the statute of limitations in these "Western Pipe" cases ceased to be tolled under Clayton 5(b) (15 U.S.C. § 16(b)). In those eleven days none of the moving parties now before this court filed any actions or motions, nor did any do so until after this court's December 3, 1969 decision. Now, after solicitation to do so by the State of Utah, some 60-odd towns and cities, and water and sewer districts in Utah (petitioners), through Utah's counsel, have: (1) moved, pursuant to Rule 24(a)(2) or in the alternative to Rule 24(b)(2), F.R.Civ.P., to intervene as plaintiffs in the Utah action; and as an alternative, (2) Utah has moved for leave to amend its complaint by adding these petitioners as parties-plaintiff; (3) as an alternative to that, Utah has moved that the court alter or amend its order of December 4, 1969, pursuant to Rule 23(c)(1),

F.R.Civ.P., so as to reinstate this as a class action as to those same petitioners. (4) As yet another alternative, Utah has moved the court for an order directing that notice be given to all members of the class alleged in plaintiff's original complaint advising them of the decision of the court to terminate the class action and then giving them a reasonable time in which to intervene in the present action. Coupled with this is the supplemental motion that the court's order of December 4 be vacated pending such notice and intervention "within a reasonable time" thereafter. (5) Utah also in the alternative moves that the court amend its prior order by adding "the magic language" from 28 U.S.C. § 1292(b) so as to facilitate an interlocutory appeal from its December 4 decision.

The affidavits of the petitioners indicate that in February of 1969 attorneys for only six or seven thereof had ever discussed with Utah's attorney the possibility of a pipe antitrust suit against the defendants herein, or had relied upon the Utah class action to protect their interests.[1] Each of the petitioners alleges that the alleged conspiracy has continued to the date of the filing of the complaint by the State of Utah. All motions have been fully briefed and argued.

While Utah and petitioners allege that the "Western Pipe" conspiracy has continued on until May 13, 1969, the problem underlying all of the motions is that of the

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[1]These include the Metropolitan Water District of Salt Lake City, Salt Lake City, Salt Lake County Sanitary District, Salt Lake City Suburban Sanitary District, Central Weber Sewer Improvement District, City of Ogden, and Bona Vista, claiming that they have purchased some $5 million of pipe from the defendants or others during the period 1946-1964. Discovery in prior pipe litigation indicates that the relevant damage period for the alleged conspiracy was between 1954 and the end of 1962.

bar of the statute of limitations to the petitioners' complaints. Underlying every motion is the desire of the petitioners to avoid that bar by any procedural route. As determined by this court in Maricopa County v. American Pipe and Construction Co. et al., 303 F. Supp. 77 (D.Ariz. 1969), the tolling of the statute of limitations on the government's "Western Pipe" conspiracy cases ceased on May 24, 1969. Since only the State of Utah, of all the parties now before this court, filed its suit prior to that date, unless by one means or another the present parties can somehow get under the now dropped portcullis and inside the golden castle of the Clayton Act, any Sherman 1 claims for any injuries prior to the four years preceding the filing of these motions are barred.[2]

Motions to Intervene Under Rule 24.

Each of the petitioners urged that they should be permitted to intervene as a matter of right under Rule 24(a) (2), maintaining that they have such an interest relating to the conspiracy charged in the Utah action that the disposition of that action may impair or impede their ability to protect that interest. They urge

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[2]Anent the above, although petitioners have pled that the conspiracy continued on until May 13, 1969, not even Utah seems to take that portion of its complaint seriously. For all antitrust (money) purposes, the only evidence so far developed in the massive prior litigation involving the same alleged conspiracies indicate with almost absolute certainty that any such conspiracies terminated at least by the end of 1962. Digging into all Sherman 1 claims for the four years immediately prior to May 13, 1969 would, therefore, to an equally almost absolute certainty, produce nothing but a dry and expensive hole for the petitioners, with no monetary recovery whatsoever. (The court here is not prejudging; it is prognosticating.) While the court cannot foreclose the petitioners from the questionable pleasure of digging such a hole, it will here bypass that segment of petitioners' allegations.

the court should adopt the "liberalized" interpretation given this section by Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967); Smuck v. Hobson, 132 U.S. App.D.C. 372, 408 F.2d 175 (1969); and Nuesse v. Camp, 128 U.S.App.D.C. 172, 385 F.2d 694 (1967). While the advisory committee to the 1966 amendment in its note to subdivision (a) stated: "If an absentee would be substantially affected in a practical sense by the determination made in an action, he should as a general rule, be entitled to intervene * * *.",[3] this court feels that Rule 24(a) (2) has been given its optimum application in *Cascade*. In *Cascade, Smuck* and *Nuesse,* each of the intervenors were attempting to implement important and well-defined public policies —a status not enjoyed by petitioners here.

It is only in those cases where the prospective intervenor appears to have a sufficient stake in the outcome and enough to contribute to the resolution of the controversy, that a right to intervene arises. Utah and petitioners admit that a judgment for or against Utah would in nowise preclude the petitioners or any of them from filing independent actions against the same defendants based upon the same alleged conspiratorial acts as set up by Utah. No decision in Utah's case would be res adjudicata as to any portion of their several causes of action. Thus, not one of the petitioners here has any real stake in the outcome of the Utah case, per se. Nor would their presence contribute to the resolution of Utah's claims. As indicated above, it is manifest that the underlying reason for the petitions to intervene is the desire of petitioners to get

[3]3B Moore's Federal Practice ¶24.01 [10].

their complaints related back to May 13, 1969, and thereby circumvent the bar of the statute of limitations.

The petitioners here manifestly have no such interest in the outcome of Utah's litigation as would mandate his court to permit them to intervene under Rule 24(a) (2).

The alternative, permissive intervention under Rule 24(b) (2), is not as easy of resolution. Petitioners' claims might well have questions of fact in common with Utah's—apparently the same parties-defendant, same alleged conspiracy, same time-damage periods, etc. It is manifest, however, that to permit even a limited intervention on the part of petitioners for the purpose of conducting joint discovery proceedings would in the context of this case, seriously prejudice the rights of the defendants, and necessarily complicate and delay resolution of discovery problems arising in Utah's case.

The seven petitioners[4] who in their bare bones affidavits indicate some reliance on Utah's class action to toll the statute for them, find some support in dicta in Judge Fullam's excellently written decision in *Philadelphia Electric*,[5] viz., that those members of the non-class who relied upon the class action to protect their interest should be allowed to intervene and their actions relate back to the date the class action was filed, even though, meanwhile, the statute had run. It appears to this court, however, that within the limited context of violations of the antitrust laws, there is a very serious doubt as to the validity of any such

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[4]See n. 1.

[5]Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D.Pa. 1968).

holding on intervention in class actions as found in *Philadelphia Electric or Nisley*[6] under either Rule 23 or Rule 24. This doubt stems from 28 U.S.C. § 2072, the statute enabling the Supreme Court to make the present Rules of Civil Procedure. "Such rules shall not abridge, enlarge or modify any substantive rights * * *"

The courts that have permitted tolling of the statute by the filing of class actions in antitrust actions have consciously or otherwise entered into an "interest-balancing" approach to the problem.[7] Judge Frank, who in York v. Guaranty Trust Co.[8] said that "to hold that such noteholders [who were justified in believing that the plaintiffs' class action was begun on their behalf] cannot, as to lapse of time, have the benefit, by intervention, of the institution of the suit by plaintiff would be to convert the Rule [Old Rule 23(a)(3)] into a trap", was but balancing off the interests of the parties. This same interest-balancing approach was considered by Judge Friendly in his concurring opinion in Escott v. Barchris Constr. Corp.,[9] in commenting on Judge Frank's "trap" argument in connection with an old spurious class action. The courts which have allowed class actions under the New Rule 23 to toll the statute in antitrust suits, likewise have taken an interest-balancing approach,[10] justifying the tolling in order to implement the congressional intent that the language of Clayton 5(b) must be given its broad-

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[6]Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10 Cir. 1961), appeal dismissed sub nom., Wade v. Union Carbide, 371 U.S. 801, 83 S.Ct. 13, 9 L.Ed.2d 46 (1962).

[7]See 13 Villanova L.R. 370, 382.

[8]143 F.2d 503, 529 (2 Cir. 1944).

[9]340 F.2d 731, 735 (2 Cir. 1965).

[10]This same approach was also adopted by the majority under the old rule in *Union Carbide*, n. 6, 300 F.2d at 590.

est application in favor of enabling private litigants to reap every benefit that they possibly can in order to encourage the enforcement of antitrust laws by private litigation,[11] and in spite of verbal recognition of the substantive nature of the statute of limitations under §§ 4B and 5(b)[12] nevertheless have determined that when there is a conflict between implementing the Rules and implementing the antitrust statute of limitations policy balancing demands that the antitrust statute of repose must be violently disturbed by continued tolling—tolling solely authorized by judicial interpretation of Rule 23. This court is not satisfied that such interpretation is permissible under 28 U.S.C. § 2072.

In enacting the antitrust laws, Congress created a novel statutory right on behalf of plaintiffs, tortious and penal in nature, but stemming from no common law right, and providing that those injured by violations of these strictly American theory-of-economics statutes may recover treble damages plus cost of suit, and a reasonable attorney's fee. 15 U.S.C. § 15. Moreover, Congress has specially set up a four year statute of limitations for such antitrust actions, § 4B, and added on to to *all* conspirators even if some have settled out or

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[11] *Maricopa, supra,* 303 F.Supp. at 85. *Cf. also; Philadelphia Electric,* n. 5, 43 F.R.D. at 460, and State of Minnesota v. United States Steel Corp., 44 F.R.D. 559, 574 (D.C.Minn. 1968).

[12] *Philadelphia Electric,* n. 5, 43 F.R.D. at 460:
"Surely, it was not the intention of the Committee, the Supreme Court, or the Congress that the 1966 amendments to Rule 23 should have any effect upon the period of limitations established by Congress, 15 U.S.C. §§ 15b, 16(b), as amended. Any such purpose would run counter to the statutory prohibition against rules which 'abridge, enlarge or modify any substantive right', 28 U.S.C. § 2072. The strong presumption of validity of these rules, Hanna v. Plumer, 380 U.S. 460, 461, 471, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), requires this court to apply the rule as written * * *."

that statute an additional period during which the statute is tolled by the institution of a civil or criminal proceeding by the United States to prevent, restrain or punish violations of any of the antitrust laws. There is even further tolling because the courts have held[13] that as to 15 U.S.C. § 15b, the rule that fraudulent concealment tolls a statute of limitations "is read into every statute of limitations."

In even further encouragement and protection to antitrust plaintiffs, the courts have held that the institution of successive governmental actions under § 5(b), if filed while the statute is still tolled, continues the tolling process beyond the conclusion of prior government actions.[14] Moreover, the statute is not only tolled as to the defendants named in the government's actions, but it is also tolled as to all co-conspirators whether named in the actions or not,[15] and it remains tolled as otherwise concluded their case with the government.[16] All of these expanding constructions of the statute of limitations have been made within the context of the antitrust acts themselves.

In the instant case, the fraudulent concealment factors allegedly present, coupled with successive governmental actions and delayed settlement of the governments suits by only one of the present defendants has

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[13]Holmberg v. Armbrecht, 327 U.S. 392; 397, 66 S.Ct. 582, 90 L.Ed. 743 (1946); Esplin v. Hirschi, 402 F.2d 94, 103 (10 Cir. 1968); Public Service Co. of New Mexico v. General Electric Co., 315 F.2d 306, 311 (10 Cir. 1963).

[14]*Maricopa, supra,* 303 F.Supp. at 86.

[15]Leh v. General Petroleum Corporation, 382 U.S. 54, 86 S.Ct. 203, 15 L.Ed.2d 134 (1965); New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., 332 F.2d 346, 354 (3 Cir. 1964), aff'd 381 U.S. 311, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965).

[16]*Maricopa, supra,* 303 F.Supp. at 87.

carried back the period of defendants' potential liability to at least 1954 and tolled the statute for over six years following the government indictments of March 1964. If "the sole reason for [these tolling provisions] of the Clayton Act was to stimulate private antitrust suits * * * and aid such private suitors",[17] it would appear that this court has completely implemented congressional intent in these "Western Pipe" cases.

The policy behind the federal enactment of an antitrust statute of limitations with an accompanying statute on tolling was declared by Congress as follows:

> "This bill makes several important changes in the tolling provisions of existing law. As presently written, section 5 of the Clayton Act tolls the statute of limitations with respect to private treble-damage suits during the pendency of a suit by the United States to punish or restrain violations of the antitrust laws. This period of tolling is continued by the present bill with several modifications.
>
> "There are many instances where the statute of limitations as to a private cause of action may nearly have expired before suit is instituted by the Government under the antitrust laws. Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble-damage action may find himself hard pressed to reap the benefit of the Government suit if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his complaint. To

[17] *New Jersey Wood Finishing*, n. 15, 332 F.2d at 354.

alleviate such difficulties, the present bill would extend the tolling period not only for the duration of the Government's antitrust suit, but for 1 year thereafter. *This would guarantee all plaintiffs an adequate period in which to take advantage of Government antitrust proceedings.*

"While the committee believes it important to safeguard the rights of plaintiffs by tolling the statute during the pendency of government antitrust actions, it recognizes that in many instances the long duration of such proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts. The committee believes the provision of this bill will *tend to shorten the period* over which private treble-damage actions will extend by requiring that the plaintiff bring his suit within 4 years after it accrued or within 1 year after the Government's case has been concluded.

"While the committee considers it highly desirable to toll the statute of limitations during a Government antitrust action and to grant plaintiff a reasonable time thereafter in which to bring suit, it does not believe that the undue prolongation of proceedings is conducive to effective and efficient enforcement of the antitrust laws. The present bill would assure all plaintiffs of at least 4 years from the time their cause of action accrued in which to institute suit. It would also guarantee every plaintiff at least a year from the close of a Government antitrust suit to prepare his case and file his complaint. But in cases where the plaintiff's action had been suspended by the pendency

of a Government antitrust proceeding, he *would be required to bring his action* either (a) within the suspension period, i.e., within 1 year after the Government suit had terminated, or (b) within 4 years after his cause of action accrued." (Emphasis added.)[18]

"In addition to establishing a uniform statute of limitations, the bill strikes at *another* problem, flowing therefrom, namely, the tolling of such a statute. At the present time, the tolling of the statute, with respect to private treble damage suits, exists during the pendency of a suit by the United States. This period is continued by the present bill. However, in order that a person might not be deprived of the benefit of the Government suit because of an abrupt termination of the Government's litigation, the bill provides for extension of the tolling period not only for the duration of the Government suit but also for 1 year thereafter. Thus the injured parties are provided with an adequate time in which to take advantage of the Government's antitrust proceedings.

"There is an added precaution also provided for in this bill to prevent undue and lengthy prolongation of stale claims. By requiring a plaintiff to institute his suit either within 4 years from the date of injury or within 1 year after the final decree in a Government case, the plaintiffs will not be afforded time to procrastinate and delay." (Emphasis added.)[19]

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[18]S.Rep. No. 619, 6/21/1955 [To accompany H.R. 4954], 2 U.S.Cong. & Admin. News 1955, pp. 2332-2333.

[19]101 Cong.Rec. Part 4, p. 5130, 84th Cong. 1st Sess., Congressman Keating, House Committee on the Judiciary.

This court has previously said that when Congress enacted 15 U.S.C. § 16(b) tolling the 4-year statute of limitations of § 4B, it made it "manifest that in encouraging the enforcement of the antitrust laws by private litigation, tolling of the statute was more important than the repose established thereby."[20] That statement may be utilized only within the context of the interpretation of the extent of tolling permitted by 15 U.S.C. § 16(b), not as an inference of the application of Rule 23 to that section.

Any "interest-balancing" approach is inapplicable in this antitrust action if either the statutory bar of § 4B (15 U.S.C. §15b) or § 5(b) (15 U.S.C. § 16(b)) created a substantive right for antitrust defendants. This problem of rights created by statute, which gives the right of action and also fixes the time within which such action may be brought, was fully considered by Chief Justice Waite in The Harrisburg, 119 U.S. 199, 214, 7 S.Ct. 140, 147, 30 L.Ed. 358 (1886), where, in determining if a suit *in rem* could be brought in admiralty under a state statute permitting recovery of damages for wrongful death on navigable waters which also fixed the time within which such action might be brought, wrote:

> "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within 12 months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. * * * Time has been made of the essence of the right, and the

[20] *Maricopa, supra,* 303 F.Supp. at 85.

right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore to be treated as limitations of the right."

This same rule was invoked in Ragan v. Merchants Transfer Co., 337 U.S. 530, 533, 69 S.Ct. 1233, 1235, 93 L.Ed. 1520 (1949), where Justice Douglas said of a state law and its statute of limitations vis-a-vis Rules 3 and 4:

"Since that cause of action is created by local law, the measure of it is to be found only in local law. * * * It accrues and comes to an end when local law so declares. * * *

"We can draw no distinction in this case because local law brought the cause of action to an end after, rather than before, suit was started in the federal court. In both cases local law created the right which the federal court was asked to enforce. In both cases local law undertook to determine the life of the cause of action. We cannot give it longer life in the federal court than it would have had in the state court without adding something to the cause of action. * * *

"It is argued that the Kansas statute in question is not an integral part of the Kansas statute of limitations. But the Court of Appeals * * * has held to the contrary." (Footnote omitted.)[21]

Judge Learned Hand in Bomar v. Keyes, 162 F.2d 136, 138, 140 (2 Cir. 1947), in also considering the

[21]This court does not view Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), as disturbing the above statement of applicable law.

statute of limitations in relation to Rules 3 and 4, covered the obverse:

> "We [here] have not to deal with a case in which the limitation is annexed as a condition to the very right of action created. * * * and when a right is not so conditioned the statute of limitations is treated as going to the remedy."

If the analyses of Justices Waite and Douglas and Judge Learned Hand on the bar of limitations in the context of rights created by statute are valid, then within the purview of the § 5(b) at least, any enlargement of tolling of that statute by virtue of the Rules cannot rationally be categorized as procedural!

The substantive-procedural dichotomy does not present a completely new problem. It has been considered by other courts but in connection with the effect of the doctrine of fraudulent concealment on § 4B. *E.g.*, Kansas City, Missouri v. Federal Pacific Electric Co., 310 F.2d 271, 282 (8 Cir. 1962); Atlantic City Electric Co. v. General Electric Co., 312 F.2d 236 (2 Cir. 1962); Public Service Co. of New Mexico, *supra*, n. 13. Each court held that Holmberg, *supra*, 327 U.S. at 397, 66 S.Ct. at 585, 90 L.Ed. 743, reads the principle that fraudulent concealment of a cause of action tolls a statute of limitations "into every federal statute of limitation", and since Congress did not provide to the contrary by unambiguous language, the rule applied to § 4B.[22] This rule appears now to be too well settled for dispute.[23]

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[22]This court has not ignored the carefully prepared and documented opinion of Judge Mathes in the *Kansas City, Missouri* case. As indicated above, the problem presented to that court, however, was not within the context of enlarging the antitrust

(This footnote is continued on next page)

Tolling of §§ 4B and 5(b) and the Enabling Acts

By judicial equitable fiat, § 4B is tolled by fraudulent concealment. By the legislative ukase of § 5(b), it is further tolled by government suit. In the context of the facts of this case, plaintiff would have the tolling period specified by § 5(b) additionally tolled by virtue of the Rules of Civil Procedure.

The Enabling Acts (28 U.S.C. §§ 2072, 2074, civil and bankruptcy rules; and 18 U.S.C. § 3771, criminal rules) confer rule-making power to the Court only over procedure and not substance. The test, as stated in Sibbach v. Wilson & Co., 312 U.S. 1, 14, 61 S.Ct. 422, 426, 85 L.Ed. 479 (1940), is "whether a rule really regulates procedure, * * * the judicial process for enforcing rights or duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." If Congress had but enacted § 4B to take the place of the hodge-podge of state statutes of limitation and omitted § 5(b), the substantive-procedural rationale of *Kansas City, Missouri* would have more valdity. When, however, with no state statutes or common law precedent before it, Congress in § 5(b) created new and specific tolling conditions and periods, and unequivocally *"Provided, however"*, that when the statute of limitations was suspended there-

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tolling period of § 5(b) by virtue of the Federal Rules of Civil Procedure, but rather an enlargement of § 4B by virtue of equitable doctrine against fraudulent concealment. This court, however, finds the *entire* Congressmen Murray-Quigley discourse concluding without anything genuinely definitive having been *agreed* upon. This court, like Judge Moore in *Atlantic City Electric Co., supra,* 312 F.2d at 243-244, believes that Chairman Celler and the Committee reports more accurately state congressional definition and intent of both §§ 4B and 5(b).

[28]Atlantic City v. General Electric Co., supra, was a 6 to 1 *en banc* opinion.

under, "any action * * * shall be forever barred unless commenced either [within the period of suspension or] within four years after the cause of action accrued", the validity of comparing state-federal statutes of limitation[24] within the milieu of substantive-procedural rights becomes questionable. In § 5(b) Congress not only created new rights for antitrust plaintiffs but also clearly created obverse rights for antitrust defendants.

It is not necessary for this court to determine whether or not the doctrine in *York*, *Hanna* and *Sibbach*, *supra*, would here control. From its legislative history this court can only conclude that in enacting §§ 4B and 5(b) together with a unique tolling statute, Congress enmeshed into the Clayton Act its own statute of limitations applicable only to equally unique antitrust causes of action and calculated to give what Congress said was sufficient time for any aggrieved parties to discover violations, gain all the benefits they could from federal actions thereon, and file their own complaints. Specifically tailored as they were for antitrust litigation, this court cannot but determine that § 5(b) certainly, and § 4B rationally, were intended by Congress to become an integral part of the entire antitrust legislative scheme.

It thus appears to this court that the only statutory "right" given to a defendant in an antitrust case, viz., the right to interpose the bar of limitations to attempted tolling of § 5(b) by Rule 23, F. R.Civ. P., is a substantive right—as a necessary segment of the total sphere of antitrust legislation. Any attempt to additionally toll § 5(b) via the Federal Rules of Civil Procedure would appear to be an abridgement of that substantive right.

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[24] *Kansas City, Missouri, supra*, 310 F.2d at 282.

As the Court stated in Holmberg v. Armbrecht,[35] *supra:* "Traditionally and for good reasons, statutes of limitation are not controlling measures of *equitable* relief", and "a suit in *equity* may lie though a comparable cause of action at law would be barred." (Emphasis added.) That same Court also said: "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive."[36]

This is not an equitable action nor do any equities appear for any petitioners. As stated above, all have regularly retained counsel. The attorneys for the "relying seven" are, presumably, no country squires, but rather, sophisticated "big city" counsel, under constant retainer as such by moneyed clients. Nothing appears in any of their affidavits to indicate why they should have "relied" on Utah's counsel and suit, rather than immediately proceed to process their own claims and suits. None was foreclosed from filing his own suit by the fact that Utah's attorneys planned to file a class action.

This court can but conclude that within the statutorily created antitrust universe § 5(b) cannot be re-tolled by any Rule to permit relation back of their several causes of action by intervenors attempting to intervene in either class or non-class actions filed for violation of the antitrust laws, after the tolling period of § 5(b) has ended.

The above conclusion carries even more thrust here, where this court has determined that the action may not be maintained as a class action. The class action, in

[35]327 U.S. at 396, 66 S.Ct. at 584.
[36]327 U.S. at 395, 66 S.Ct. at 584.

the words of the Committee,[27] has been "stripped of its character as a class action." Since there never was a class, the members of the "class" cannot claim that they started their suits, vicariously, before the tolling period expired. There being no class, there is no connecting link available, even for the "relying seven", for attachment of any "relation back" hook.

Leave to intervene, with relation back of their actions to May 13, 1969, is therefore DENIED to *all* 60-odd intervenors-petitioners.

(2) Motion for Leave to Amend and Add Co-parties Plaintiff

The object of Utah's alternative (2) motion for leave to amend and add intervenors as co-parties plaintiff under Rule 15, too, is to get the intervenors' (as additional parties) complaints related back to May 13, 1969, and "under the portcullis." While Rule 15(c) permits an amendment changing a party *against* whom a claim is asserted, under certain circumstances, to relate back—if the statute has not run, the Advisory Committee Notes of 1966 state:

> "The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs."[28]

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[27]Committee on Rules of Practice and Procedure.

[28]3 Moore's Fed.Practice 15.01 [9], p. 811.

A new party-plaintiff cannot be added by amendment after the statute has run.[39] This motion too must be denied.

(3) Motion to Reinstate Class Action

Utah's alternative motion (3) is that this court alter its order of December 4, 1969, under Rule 23(c) (1), F.R.Civ.P., to reinstate a class action, just for the present petitioners. Nothing contained in Utah's moving papers adds any new element or basis upon or from which this court would feel itself either impelled or compelled to change either its findings, conclusions or decision of December 4. The fact that the states of Wyoming, Idaho and Nevada and the public bodies therein who have purchased pipe during the relevant years of the "Western Pipe Conspiracy" appear in this alternative motion to have been abandoned by Utah, also in no wise changes any basis of this court's December 4, 1969 decision. This third alternative is likewise DENIED.

(4) Motion to Vacate Court's Non-Class Order and Permit Intervention Relating Back

Utah's alternative motion (4) is that the court vacate its December 4 order of non-class suit, direct that notice be given to the some 800 "class members" of this court's decision of "non-class action" and permit those who want to, to intervene within a reasonable time, with their intervention relating back to May 13, 1969. While Utah urges that "Fairness and due process

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[39]Iocono v. Anastasio, 79 F.Supp. 378 (S.D.N.Y.1918); Aarhus Oliefabrik A/S v. A. O. Smith Corp., 22 F.R.D. 33 (E.D.Wis.1958); Murfkan v. Kahn, 11 F.R.D. 520 (S.D.Fla. 1951); Messelt v. Security Storage Co., 14 F.R.D. 507 (D.Del. 1953); Kerner v. Rackmill, 111 F.Supp. 150 (M.D.Pa.1953).

require that at the very least the class members be given notice of the court's decision and a reasonable opportunity to join in this action",[30] Utah bypasses the fact that defendants as well as plaintiff have equal rights to "fairness and due process." This court has already determined the due process aspects of the case. Leaden procrastination and delay in filing their own complaints on the part of "class members" may not here, *ipso facto*, be transmuted into golden participation by the emotional wand of "fairness". This motion is but another attempt to evade the statutory bar. Unfortunately for plaintiff, for the reasons heretofore set forth it too fails, and the motion is DENIED.

(5) Motion for Certification for Interlocutory Appeal

As a last motion (5), Utah asks that this court's order of December 4, 1969, be certified for interlocutory appeal.

This court is not prepared so to act, at this time at least. It did not in December last, nor does it now feel, that on the facts before it there is any substantial ground for a difference of opinion as to how this antitrust case should be treated or handled. Utah, having filed its claim in time, will have its day in court. All governmental bodies in the alleged "class" who may feel themselves injured by any alleged "Western Pipe" conspirators, have had over six years within which to seek redress, jointly or severally. Each has at all times been represented by counsel; many of the cities and water and sewer districts have operating budgets in the 7 to 9 figure dollar bracket. All are—or should be—sophisticated in both competitive bidding practices as well as litigation. No "creditors' bill" situations are here

[30]Plaintiff's Memorandum in Support of Motions, p. 15.

involved. All of those factors as well as more went into and compelled this court's decision of December 4, 1969.

The motion must be DENIED.

As the pleadings now stand, since petitioners have *alleged* a cause of action for the four years preceding December 12, 1969, when these motions were filed, this court could not now dismiss their complaints. In futuro, it can only rule on problems, discovery, etc., for periods after, as distinguished from prior to December 12, 1964, in the context of the statutory bar for any transactions or claims arising prior thereto. Therefore as to all parties-plaintiff now before the court, the court's rulings do not with finality dispose of their cases. If, however, petitioners claims were limited to pre-December 12, 1964 transactions, different legal aspects would arise.

Defendants will prepare the necessary order.

DATED: Honolulu, Hawaii, this 26 day of March, 1970.

/s/ Martin Pence
United States District Judge

Entered March 30, 1970.

Intervenors' Amended Complaint [Proposed].

United States District Court, Central District of California.

State of Utah, et al., Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

Intervenors, and each of them, by their attorneys, hereby amend their proposed Intervenors' Complaint in the following and only in the following regard:

Paragraph 24 of Intervenors' Proposed Complaint is amended to read as follows:

> Beginning prior to the year 1954 in the case of concrete pipe and prior to the year 1958 in the case of steel pipe and probably as far back as 1946 in both cases and continuing, so far as Intervenors know, up and to a date four years preceding the date of filing of this complaint, the defendants and co-conspirators engaged in an unlawful combination and conspiracy to eliminate competition and stabilize and maintain the prices of the herein defined types of pipe, thereby restraining the hereinabove-described trade and commerce in violation of Section 1 of the Act of Congress of July 2, 1890, as amended 15 U.S.C. Section 1, commonly known as the Sherman Act.

This amendment shall be effective as of the original filing date of Intervenors' Proposed Complaint.

DATED this 19th day of June, 1970.

VERNON B. ROMNEY
Attorney General State of Utah

MULLINER, PRINCE & MANGUM
Gerald R. Miller
Denis R. Morrill

NESLEN & MOCK
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By /s/ Denis R. Morrill
Special Assistant Attorneys
General State of Utah
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206 El Paso Natural Gas Bldg.
Salt Lake City, Utah 84111

Findings of Fact, Conclusions of Law, and Order on Motions to Intervene and to Amend.

United States District Court, Central District of California.

State of Utah, Plaintiff, vs. American Pipe and Construction Company; United Concrete Pipe Corporation; Utah Concrete Pipe Company; W. R. White Company; United States Steel Corporation; Kaiser Steel Corporation; Smith-Scott, Inc.; U.S. Industries, Inc., Defendants. Civil No. 69-1964-MP.

The Court on December 4, 1969, filed its Order that this action shall not be maintained as a class action. Subsequently, some sixty towns, cities, and other governmental subdivision and entities in the State of Utah moved, pursuant to Rule 24(a)(2), or in the alternative pursuant to Rule 24(b) (2) F.R.C.P., to intervene as plaintiffs herein, and plaintiff moved pursuant to Rule 15 F.R.C.P., for leave to amend its Complaint by adding the aforesaid petitioners as parties plaintiff or, in the alternative, that the Court alter or amend its Order of December 4, 1969, pursuant to Rule 23(c)(1), F.R.C.P., so as to reinstate this as a class action as to those same petitioners; plaintiff also moved as another alternative, for an order directing that notice be given to all members of the class alleged in plaintiff's original Complaint advising them of the decision of the Court to terminate the class action and then giving the members of the "class" a reasonable time in which to intervene in the present action and that the Court's Order of December 4, 1969, be vacated pending such notice and intervention "within a reasonable time" thereafter; and, further, that the Court amend its prior Order to permit an interlocutory appeal from the prior Order of December 4, 1969.

The plaintiff and defendants having adduced evidence with respect thereto, and the Court being fully advised in the premises, makes the following findings of fact and conclusions of law:

1. All governmental bodies in the alleged "class" who may feel themselves injured by any alleged "Western Pipe" conspirators had over five years from at least March 10, 1964, to May 23, 1969, to seek redress, jointly or severally. Each has at all times been represented by counsel. No "Creditors' bill" situations are here involved.

2. No more than seven of petitioners ever discussed with plaintiff's attorney the possibility of a pipe antitrust suit against the defendants herein. Nothing appears in any of their affidavits to indicate why they should have "relied" on Utah's counsel and suit, rather than immediately proceed to process their own claims and suits. None was foreclosed from filing his own suit by the fact that plaintiff's attorneys planned to file a class action. None of the petitioners moving to intervene were entitled to rely upon such action as a class action.

3. The Court finds further that there is insufficient showing by any of the aforesaid petitioners that they properly relied upon the purported class action brought by the State of Utah; and the Court, therefore, finds that none of such parties did in fact rely upon such action as a class action.

4. The granting of any of the aforesaid motions to intervene or to amend the Complaint would violate the rights of defendants to fairness and due process.

5. The tolling of the statute of limitations based upon the government actions pleaded in Paragraph VIII of the Utah Complaint, which tolling is also pleaded in each of the proposed causes of action by each of the parties moving to intervene herein, ceased on May 24, 1969; and insofar as any of the proposed causes of action by said parties moving to intervene herein is based upon the aforesaid government actions pleaded in Paragraph VIII of the Utah Complaint, such action is barred by the applicable statute of limitations.

6. There never was a class within the meaning of Rule 23, F.R.C.P., as alleged in the Complaint herein, and the members of the purported "class" described herein cannot claim that they started their suits, vicariously, before the tolling period expired.

7. The Court's Order of December 4, 1969, does not involve a controlling question of law as to which there is a substantial ground for difference of opinion.

8. The applicants have, by amendment to their proposed complaint, limited their allegations of conspiracy to a date four years preceding the time of filing. Accordingly, a final order may be entered against applicants for intervention.

NOW, THEREFORE, IT IS ORDERED AS FOLLOWS:

1. Each of the aforesaid motions of the petitioners to intervene and the motions of plaintiff to amend the Complaint is hereby denied; that is to say, the motions for leave to intervene pursuant to Rule 24, F.R.C.P. and Rule 21, F.R.C.P.

2. Each of the motions of plaintiff to vacate the Court's Order of December 4, 1969, and to reinstate the class action is in all respects denied.

3. The motion of plaintiff that the Court's Order of December 4, 1969, be certified for interlocutory appeal pursuant to Section 1292(b) of Title 28, U.S.C., is hereby denied.

DATED: June 23, 1970.

/s/ Martin Pence

United States District Court Judge

Filed June 23, 1970.
Entered July 8, 1970.

Notice of Appeal.

United States District Court, Central District of California.

State of Utah, et al. Plaintiffs, vs. American Pipe and Construction Company, et al., Defendants. Civil No. 69-1964-MP.

Notice is hereby given that Weber Basin Water Conservancy District, Salt Lake County Water Conservancy District, Salt Lake City Suburban Sanitary District No. 1, Salt Lake City Suburban Sanitary District No. 2, Bountiful Water Subconservancy District, Bona Vista Water Improvement District, Central Weber Sewer Improvement District, Granger-Hunter Improvement District, Metropolitan Water District of Salt Lake City, Central Davis County Sewer District, North Davis County Sewer District, Sandy Suburban Improvement District, South Davis County Sewer Improvement District, South Davis County Water Improvement District, South Ogden Conservation District, Taylorsville-Bennion Improvement District, Weber-Box Elder Conservation District, Salt Lake County, Salt Lake City, Ogden City, Provo City, City of South Ogden, City of Logan, City of Kaysville, City of Layton, City of West Jordan, City of Vernal, City of Salem, City of Springville, City of Payson, City of Oak City, City of North Salt Lake, City of Myton, City of Murray, City of Mt. Pleasant, City of Monticello, Town of Minersville, City of Midvale, City of Manti, City of Lehi, Town of Levan, Town of Huntsville, City of Helper, City of Garland, City of Fillmore, City of Clearfield, City of Castledale, City of Nephi, Town of West Point, City of Blanding, applicants for intervention above-named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that

part of the order entered in this action on the 8th day of July, 1970 which denied said applicants' motion for leave to intervene as plaintiffs.

Dated this 31st day of July, 1970.

VERNON B. ROMNEY
Attorney General State of Utah

MULLINER, PRINCE & MANGUM
Gerald R. Miller
Denis R. Morrill

NESLEN & MOCK
Kent Shearer
By /s/ Gerald R. Miller
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206 El Paso Natural Gas Bldg.
Salt Lake City, Utah 84111

Filed August 4, 1970.

[Endorsement omitted in printing]

Motion to Extend Time for Appeal.

United States District Court, Central District of California.

State of Utah, Plaintiff, vs. American Pipe and Construction Company, et al., Defendants, Weber Basin Water Conservancy District, et al., Applicants for Intervention. Civil No. 69-1964-MP.

Salt Lake County Cottonwood Sanitary District, City of Grantsville, City of Riverton, City of Sandy and Town of Annabella, applicants for intervention, move the Court for an order enlarging until September 8, 1970 the period within which applicants for intervention may appeal to the United States Court of Appeals for the Ninth Circuit from the judgment entered herein on the 8th day of July, 1970 on the ground of excusable neglect based upon the failure of these applicants for intervention to learn of the omission of their names as listed appellants in the notice of appeal filed herein on July 6, 1970. These applicants for intervention understood and intended that their names be included in said notice of appeal and did not learn of the inadvertent omission of said names until the 20th day of August, 1970, as more particularly shown by the affidavits of Gerald R. Miller, Denis R. Morrill and Connie Wilson attached hereto.

Dated this 25th day of August, 1970.

VERNON B. ROMNEY
Attorney General State of Utah

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Gerald R. Miller
Denis R. Morrill

NESLEN & MOCK
Kent Shearer
By /s/ Gerald R. Miller
Special Assistant Attorneys
General State of Utah
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Salt Lake City, Utah 84111

ATTACHMENT TO MOTION TO EXTEND TIME FOR APPEAL

United States District Court, Central District of California, Civil No. 69-1964-MP.

[Title omitted in printing]

AFFIDAVIT OF GERALD R. MILLER

[Jurat omitted in printing]

GERALD R. MILLER, being first duly sworn on oath, deposes and says:

1. I am one of the attorneys for plaintiff and the applicants for intervention in the above-entitled case.

2. After receipt of the Court's opinion dated March 26, 1970, I attempted to contact the applicants for intervention in order to advise them of the order which would be entered denying their motion for intervention and in order to review the status of the case with them so that a decision could be made on the course of action which would be pursued by the applicants.

3. The majority of the applicants subsequently decided to amend paragraph 4 of the intervenors' proposed complaint so as to limit their allegations of conspiracy to a date four years preceding the time of the filing. Following this amendment and on July 8, 1970, the Court entered its findings of fact, conclusions of law and order on motions to intervene and to amend. It is the desire of the majority of the applicants for intervention to appeal to the United States Court of Appeals for the Ninth Circuit from that part of the order which denied the motion for leave to intervene as plaintiffs.

4. On July 6, 1970 a notice of appeal was filed herein. It was my intent as counsel for the appellants

to appeal on behalf of all of the applicants for intervention except those which had specifically indicated that they did not wish to pursue this matter further. Accordingly, I directed my secretary to include the name of each applicant for intervention other than those which had contacted my office to the contrary.

5. On the afternoon of August 20, 1970 in the course of preparing an agreed statement on appeal pursuant to Rule 10(d) of the Federal Rules of Appellate Procedure, I discovered for the first time that the names listed as appellants on the notice of appeal filed July 6, 1970 failed to include five of the applicants for intervention which desire to be included in the appeal. In checking with my office staff, I determined that the names on said notice of appeal had been proofread against the original motion to intervene dated December 11, 1969, in which some 64 lesser entities of the State of Utah moved for intervention. The five additional entities which wish to join in the appeal were brought before the Court in a motion to intervene dated December 29, 1970. Accordingly, the omission of these five names from the notice of appeal was not detected.

6. It is the intention of Salt Lake County Cottonwood Sanitary District, City of Grantsville, City of Riverton, City of Sandy and Town of Annabella to appeal from the Court's ruling. It was my intention as counsel for the applicants for intervention to include these five entities along with the other 64 entities as appellants listed on the notice of appeal. The absence of their names from the notice of appeal filed on July 6, 1970 is due to inadvertence and excusable neglect.

7. The file on this case which is maintained in my office is extensive and includes many hundreds of docu-

ments. Due to the large number of applicants for intervention, it has been difficult for my staff to prepare pleadings in which every applicant is listed in the case heading. We have done our best to check each pleading to insure that all of the names were listed correctly. The omission of five entities from the notice of appeal filed July 6, 1970 was a mechanical error which we failed to detect.

8. Under all of the circumstances, I feel that the omission constitutes excusable neglect. Accordingly, I have filed a notice of appeal with the above-entitled Court on behalf of the five applicants for intervention which were inadvertently omitted from the first notice of appeal. I have also filed a motion with the Court praying for enlargement of the period within which a notice of appeal may be filed.

Further affiant sayeth naught.

/s/ Gerald R. Miller

Executed August 25, 1970.

[Notarial Acknowledgment omitted in printing]

ATTACHMENT TO MOTION TO EXTEND TIME FOR APPEAL

United States District Court, Central District of California, Civil No. 69-1964-MP.

[Title omitted in printing]

AFFIDAVIT OF DENIS R. MORRILL

[Jurat omitted in printing]

DENIS R. MORRILL, being first duly sworn, deposes and states as follows:

1. I am an attorney associated with the firm of Mulliner, Prince & Mangum. The firm of Mulliner, Prince & Mangum was retained by the State of Utah to prosecute this action and later by a number of governmental entities to prosecute their motions to intervene. After denial of the motions to intervene, many of the intervenors decided to appeal that denial.

2. A notice of appeal was prepared for these intervenors by a member of this firm, and it was given to me to make a final check to assure that those intervenors which wanted to appeal were listed on the notice. I checked the records in the files and; along with a secretary, determined that the notice of appeal contained all of the intervenors which wanted to appeal from the denial of the motion to intervene dated December 11, 1969.

3. In checking the names of intervenors to be included on the notice of appeal, through inadvertence on my part, I failed to check the motion to intervene

dated the 29th day of December, 1969 wherein five additional intervenors moved to intervene. Thus, while these five intervenors whose motion had been denied wished to appeal, their names were not included on the notice of appeal filed July 6, 1970.

4. I just became aware of the omission of these names on August 20, 1970 when I was so informed by Gerald R. Miller.

Further affiant sayeth naught.

/s/ Denis R. Morrill

Executed August 25, 1970.

[Notarial Acknowledgment omitted in printing]

ATTACHMENT TO MOTION TO EXTEND TIME FOR APPEAL

United States District Court, Central District of California, Civil No. 69-1964-MP.

[Title omitted in printing]

AFFIDAVIT OF CONNIE WILSON

[Jurat omitted in printing]

CONNIE WILSON, being first duly sworn on oath, deposes and says:

1. I am employed by the firm of Mulliner, Prince & Mangum as a legal secretary. In such capacity I have assisted in the secretarial work involved in the above-entitled case for the last year and a half.

2. In July of 1970 I typed the notice of appeal which was filed with the Court on July 6, 1970. In connection with the preparation of said notice of appeal, I was instructed to check the name of each appellant carefully in order to insure that all of the entities which wished to appeal were included on the notice of appeal. I proofread all of the names on the notice of appeal to the best of my ability and concluded that each of the parties desiring to appeal were listed thereon.

3. Subsequently, on August 20, 1970 I discovered for the first time that I had inadvertently omitted five names from the notice of appeal. These names were included on a motion to intervene filed approximately one month following the original motion for interven-

tion. The omission occurred because the notice of appeal filed July 6, 1970 was proofread against the original motion for intervention. At the time I checked the notice of appeal I was not aware of the subsequent motion for intervention dated December 29, 1970. It was my intent to insure that each of the applicants for intervention which desired to join in the appeal were included and listed on the notice of appeal. Five entities were omitted through inadvertence and oversight.

Further affiant sayeth naught.

/s/ Connie Wilson

Executed August 25, 1970.

[Notarial Acknowledgment omitted in printing]

Notice of Appeal.

United States District Court, Central District of California.

State of Utah, Plaintiff, vs. American Pipe and Construction Company, et al., Defendants, Weber Basin Water Conservancy District, et al., Applicants for Intervention. Civil. No. 69-1964-MP.

Notice is hereby given that Salt Lake County Cottonwood Sanitary District, City of Grantsville, City of Riverton, City of Sandy and Town of Annabella, applicants for intervention in the above-entitled case, hereby appeal to the United States Court of Appeals for the Ninth Circuit from that part of the order entered in this action on the 8th day of July, 1970 which denied said applicants' motion for leave to intervene as plaintiffs.

Dated this 25th day of August, 1970.

VERNON B. ROMNEY
Attorney General State of Utah

MULLINER, PRINCE & MANGUM
Gerald R. Miller
Denis R. Morrill

NESLEN & MOCK
Kent Shearer
By /s/ Gerald R. Miller
Special Assistant Attorneys
General State of Utah
Attorneys for Plaintiff and
Applicants for Intervention
206 El Paso Natural Gas Bldg.
Salt Lake City, Utah 84111

Order Extending Time Within Which to Appeal.

United States District Court, Central District of California.

State of Utah, Plaintiff, vs. American Pipe and Construction Company, et al., Defendants. Weber Basin Water Conservancy District, et al., Applicants for Intervention. Civil No. 69-1964-MP.

Salt Lake County Cottonwood Sanitary District, City of Grantsville, City of Riverton, City of Sandy and Town of Annabella, applicants for intervention in the above entitled case, having filed their motion dated August 25, 1970 for an order pursuant to Rule 4(a) of the Federal Rules of Civil Procedure extending time within which to appeal; and notice of said motion having been given to all counsel of record in a manner deemed appropriate by this Court; and it appearing that said applicant's failure to appeal within the expiration time is due to excusable neglect based on the failure of said applicants to learn of the omission of their names as listed appellants in the notice of appeal filed herein on August 4, 1970, and the Court being fully advised in the premises.

IT IS HEREBY ORDERED that Salt Lake County Cottonwood Sanitary District, City of Grantsville, City of Riverton, City of Sandy and Town of Annabella are hereby granted an extension of time to and until September 6, 1970 within which to file a notice of appeal in the above entitled case. The notice of appeal dated August 25, 1970 and lodged with the Court August 26, 1970 is hereby validated and the same is deemed to be filed timely.

DATED this 2nd day of September, 1970.

/s/ Martin Pence
United States District Court Judge

Agreed Statement on Appeal Pursuant to Rule 10(d) of the Federal Rules of Appellate Procedure.*

United States District Court, Central District of California.

State of Utah, Plaintiff, vs. American Pipe and Construction Company, et al., Defendants, Weber Basin Water Conservancy District, et al., Applicants for Intervention. Civil No. 69-1964-MP.

1. On March 10, 1964, a United States grand jury in the Southern District of California, Central Division, returned five indictments, copies of which, marked Exhibit A [R. 8-46], are attached hereto and incorporated herein. Each of said indictments named certain individual defendants and two or more of the following corporate defendants: American Pipe and Construction Company, United Concrete Pipe Corporation, United States Steel Corporation, Kaiser Steel Corporation, Smith Scott, Inc. and U.S. Industries, Inc. Each of the indictments charge the defendants named therein with combining and conspiring together in restraint of interstate trade in a specified product line of steel and/or concrete pipe in violation of 15 U.S.C. § 1 (Sherman 1), in that they submitted collusive and rigged bids for the sale of such pipe and allocated and divided business among themselves.

2. On June 19, 1964, pleas of *nolo contendere* were tendered by said defendants, accepted by the court, and judgments were entered thereon. No appeals were taken therefrom and none could be taken since such judgments were entered pursuant to consent of

[*Note: Exhibits to this Agreed Statement on Appeal are omitted in printing and references are made to the Record on Appeal.]

the parties. Copies of such judgments, marked Exhibit B [R. 48-68], are attached hereto.

3. On June 23, 1964, the United States filed five civil actions in the United States District Court for the Southern District of California, Central Division, against various of said defendants, each such action relating to a specified product line of steel and/or concrete pipe. In these five government civil actions, the United States predicated the complaints upon 31 U.S.C. §§ 231-233 (False Claims Act) and 15 U.S.C. § 15(a) (Clayton 4A), none of which actions could invoke the tolling provisions of § 5(b) of the Clayton Act. The civil complaints were based on facts uncovered by the government in preparing its criminal indictments. Copies thereof, marked Exhibit C [R. 70-134], are attached hereto and incorporated herein.

4. On October 28, 1964, the government amended each of its five complaints by adding a new count under 15 U.S.C. § 4 seeking to restrain continuing violations by the defendants named therein of § 1 of the Sherman Act. Copies of such amended complaints, marked Exhibit D [R. 136-228], are attached hereto and incorporated herein.

5. On December 8, 1967, each of the defendants, excepting American Pipe and Construction Company, entered into consent decrees in each of the government civil cases in which they were respectively named as defendants. Copies of such judgments, marked Exhibit E [R. 230-84], are attached hereto and incorporated herein.

6. On May 24, 1968, a "final judgment" was entered against American Pipe and Construction Company in each of the three government cases in which it had

been named as a defendant. Copies of such judgments, marked Exhibit F [R. 286-315], are attached hereto.

7. On May 13, 1969 the State of Utah filed its complaint in the above-entitled action in the United States District Court for the District of Utah. A copy of the complaint is labeled Exhibit G [R. 317-40] and attached hereto. The complaint was filed against all of the corporate defendants named by the United States in its proceedings and in addition against Utah Concrete Pipe Company and W. R. White Company. The State of Utah brought the above-entitled action on behalf of itself and all of its lesser governmental entities who were end users of pipe acquired from the defendants, co-conspirators and others. Further, the class alleged in the complaint was broad enough to include all other states in the "Western Area" as therein defined which had not previously filed a similar action, either on their own behalf or as members of a previous class action, and included their lesser governmental entities.

8. By order filed August 28, 1969, the Judicial Panel on Multidistrict Litigation transferred the State of Utah case to the Central District of California for assignment to Judge Martin Pence, Chief Judge of the District of Hawaii, for coordinated or consolidated pretrial proceedings under 28 U.S.C. § 1407.

9. On November 14, 1969, the defendants moved the Court for an order determining that the action should not be maintained as a class action. A copy of said motion, marked Exhibit H [R. 342-44], is attached hereto and incorporated herein. Defendants' mo-

tion came on for hearing before the Court on December 1, 1969.

10. On December 4, 1969, the Court entered its findings of fact and order respecting the class action. A copy thereof, marked Exhibit I [R. 346-47], is attached hereto and incorporated herein. A copy of the Court's opinion, marked Exhibit J [R. 349-57], is attached hereto and incorporated herein.

11. On December 12, 1969, and December 29, 1969, some 69 lesser governmental entities of the State of Utah filed motions to intervene as plaintiffs. Copies of said motions, together with the proposed complaint in intervention attached thereto and affidavits filed in support thereof, marked Exhibit K [R. 359-438], are attached hereto and incorporated herein. On March 9, 1970, a hearing was had before the Court on said motions. Subsequently, the applicants for intervention amended paragraph 24 of the intervenor's proposed complaint so as to limit their allegations of conspiracy to a date four years preceding the time of filing. A copy of said amendment, marked Exhibit L [R. 440-41], is attached hereto and incorporated herein.

12. On July 8, 1970, the Court entered its findings of fact, conclusions of law and order on motions to intervene and to amend. A copy of the same, marked Exhibit M [R. 443-45], is attached hereto and incorporated herein. In said order the Court denied the motions of the applicants to intervene. A copy of the Court's opinion, marked Exhibit N [R. 447-65] is attached hereto and incorporated herein.

13. Exhibit O [R. 467-69] is the Notice of Appeal filed herein dated July 31, 1970. The appellants appeal from the findings of fact, conclusions of law and order entered on July 8, 1970, denying their motions to intervene.

14. In addition to the record heretofore attached as exhibits hereto, the following portions of the record are also attached as exhibits hereto:

Memorandum in Support of Motions Filed by Plaintiff and Applicants for Intervention	Exhibit P [R. 471-88]
Points and Authorities of Defendants in Opposition to Motions to Intervene and to Amend	Exhibit Q [R. 490-521]
Affidavit of Haldor T. Benson in Support of Points and Authorities of Defendants in Opposition to Motions to Intervene and to Amend	Exhibit R [R. 523-34]
Request for Admission, filed by defendant United States Steel Corporation and dated 1/22/70	Exhibit S [R. 536-42]
Affidavit of Oliver F. Green in Opposition to Motion to Intervene as Plaintiffs or in the Alternative, to Amend the Complaint to Add Additional Parties and *Memorandum on Behalf of Defendant United States Industries in Opposition to Motion to Intervene or in the Alternative to Amend the Complaint to Add Additional Parties*	Exhibit T [R. 544-57]

Memorandum of Defendant Kaiser Steel Corp. in Opposition to Motion to Intervene, to Amend and to Add Additional Parties	Exhibit U [R. 559-64]
Affidavit of Dominic B. King	Exhibit V [R. 566-69]
Affidavit of Amos Clements of 2/6/70	Exhibit W [R. 571-72]
Supplemental Memorandum of Utah Concrete Pipe Company in Opposition to Motions to Intervene and Amend	Exhibit X [R. 574-79]
Memorandum of Plaintiff and Applicants for Intervention in Reply to Defendants' Memoranda in Opposition	Exhibit Y [R. 581-94]
Motion to Extend Time of Appeal together with *Affidavits* in Support Thereof	Exhibit Z [R. 596-604]
Notice of Appeal dated August 25, 1970	Exhibit ZA [R. 606]
Order Extending Time Within Which to Appeal	Exhibit ZB [R. 608]
Summary of Dates	Exhibit ZC [R. 610-14]

15. The question presented on appeal is "Did the Court err in denying the aforesaid motions to intervene?"

The parties hereto, through their respective counsel, hereby agree that the foregoing statement of the case contains those facts which they consider to be essential to a decision of the question involved by the United States Court of Appeals for the Ninth Circuit.

Dated this 4th day of September, 1970.

VERNON B. ROMNEY
Attorney General
State of Utah

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Denis R. Morrill
NESLEN & MOCK
Kent Shearer
By /s/ Gerald R. Miller
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Jesse R. O'Malley
Lawrence E. Stickney
Attorneys for Defendant
United States Steel Corporation

By /s/ Jesse R. O'Malley
JESSE R. O'MALLEY
for Defendants-Appellees

The foregoing statement is hereby approved this 17th day of September, 1970.

/s/ Martin Pence
United States District Court Judge

Filed September 21, 1970.

United States Court of Appeals, for the Ninth Circuit.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees, Weber Basin Water Conservancy District, et al., Applicants for Intervention-Appellants. No. 26,542.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees, Salt Lake County Cottonwood Sanitary District, Cities of Grantsville, Riverton, Sandy & Town of Annabella, Applicants for Intervention-Appellants. No. 26,543.

SUMMARY OF DATES

Date	Event	Page Number
1954 to a date four years preceding the filing of the complaint	Complaint Period	1 [R. 611]
March 10, 1964	Return of Five Indictments Upon Which Utah Complaint is Based	1 [R. 611]
June 19, 1964	Criminal Cases Terminated With Judgments on Nolo Pleas	2 [R. 612]
June 23, 1964	Five Civil False Claims Actions Instituted by United States of America	2 [R. 612]
October 28, 1964	Amended Complaints Filed by United States of America to Prevent and Restrain Violations of Sherman Act	3 [R. 613]
December 8, 1967	Consent Decrees Entered in Civil Actions as to All Defendants Except American Pipe and Construction Co.	3 [R. 613]
May 27, 1968	American Pipe and Construction Co. Enters into Consent Decrees	4 [R. 614]
December 8, 1968	One Year After Consent Decrees Entered in Civil Actions as to all Defendants Except American Pipe and Construction Co.	

Date	Event	
May 13, 1969	Complaint Filed by State of Utah	4 [R. 614]
December 12, 1969	Motion to Intervene as Plaintiffs	4 [R. 614]
1954 to a date four years preceding the filing of the complaint	Complaint period	
March 10, 1964	Return of Five Indictments (Southern District of California, Central Division 1964) upon Which Utah Complaint is based:	

1. United States of America
   v.
   American Pipe and Construction Co., and certain individuals; United Concrete Pipe Corp.; and certain individuals
   (Criminal No. 33338)
   Concrete Pipe

2. United States of America
   v.
   Kaiser Steel Corporation; United States Steel Corporation; and certain individuals
   (Criminal No. 33339)
   Steel Large Diameter Pressure Pipe

3. United States of America
   v.
   United Concrete Pipe Corp.; American Pipe and Construction Co.; Kaiser Steel Corporation; United States Steel Corporation; and certain individuals
   (Criminal No. 33340)
   Alternate Large Diameter Pressure Pipe

4. United States of America
   v.
   U.S. Industries, Inc.; American Pipe and Construction Co.; Smith-Scott, Inc.; United Concrete Pipe Corp.; United States Steel Corporation; and certain individuals
   (Criminal No. 33341)
   Alternate Small Diameter Pressure Pipe

Date	Event
	5. United States of America v. United States Steel Corporation; Smith-Scott, Inc.; U.S. Industries, Inc.; and certain individuals *(Criminal No. 33342)* Steel Small Diameter Pressure Pipe
June 19, 1964	Criminal Cases Terminated With Judgments on Nolo Pleas
June 23, 1964	Civil Actions Instituted (Southern District of California for the Central Division, 1964) by United States of America Pursuant to False Claims Act (31 U.S.C. §§ 231-233) and Alternately Pursuant to Section 4A of the Clayton Act (15 U.S.C. § 15a):
	1. United States of America v. American Pipe and Construction Co.; United Concrete Pipe Corp. *(Civil No. 64-832)* Concrete Pipe
	2. United States of America v. Kaiser Steel Corporation; United States Steel Corporation *(Civil No. 64-833)* Steel Large Diameter Pressure Pipe
	3. United States of America v. United Concrete Pipe Corp.; Kaiser Steel Corporation; American Pipe and Construction Co.; United States Steel Corporation *(Civil No. 64-834)* Alternate Large Diameter Pressure Pipe
	4. United States of America v. U.S. Industries, Inc.;

Date	Event
	Smith-Scott Co. Inc.; United States Steel Corporation; American Pipe and Construction Co.; United Concrete Pipe Corp. *(Civil No. 64-835)* Alternate Small Diameter Pressure Pipe
	5. United States of America v. United States Steel Corporation; Smith-Scott, Co., Inc.; U.S. Industries, Inc. *(Civil No. 64-836)* Steel Small Diameter Pressure Pipe
October 28, 1964	Amended Complaints Filed by United States of America to Add Claim Pursuant to Sections 1 and 4 of the Sherman Act (15 U.S.C. §§ 1, 4) to Prevent and Restrain Violations of Sherman Act
December 8, 1967	Consent Decrees Entered in Civil Actions as to All Defendants Except American Pipe and Construction Co.:
	1. *Civil No. 64-832:* Consenting: United Concrete Pipe Corp. Not Consenting: American Pipe and Construction Co. Concrete Pipe
	2. *Civil No. 64-833:* All Defendants Consenting: Kaiser Steel Corporation; United States Steel Corporation Steel Large Diameter Pressure Pipe
	3. *Civil No. 64-834:* Consenting: United States Steel Corporation; United Concrete Pipe Corp.; Kaiser Steel Corporation. Not Consenting: American Pipe and Construction Co. Alternate Large Diameter Pressure Pipe

Date	Event
	4. *Civil No. 64-835:* Consenting: U.S. Industries, Inc.; Smith-Scott, Co., Inc.; United States Steel Corporation; United Concrete Pipe Corporation Not Consenting: American Pipe and Construction Co. Alternate Small Diameter Pressure Pipe
	5. *Civil No. 64-836:* All Defendants Consenting: United States Steel Corporation; Smith-Scott, Co., Inc.; U.S. Industries, Inc. Steel Small Diameter Pressure Pipe
May 27, 1968	Consent Decrees of American Pipe and Construction Co. Entered:
	1. *Civil No. 64-832:* Concrete Pipe
	2. *Civil No. 64-834:* Alternate Large Diameter Pressure Pipe
	3. *Civil No. 64-835:* Alternate Small Diameter Pressure Pipe
December 8, 1968	One Year After Consent Decrees Entered on December 8, 1967, as to All Defendants Except American Pipe and Construction Co. (See Section 5(b) of Clayton Act [15 U.S.C. § 16(b)]).
May 13, 1969	Complaint Filed by State of Utah herein
December 12, 1969	Motion to Intervene as Plaintiffs

Filed September 21, 1970.

Order.

In the United States Court of Appeals, for the Ninth Circuit.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees, Weber Basin Water Conservancy District, et al., Applicants for Intervention-Appellants. No. 26,542.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees, Salt Lake County Cottonwood Sanitary District, Cities of Grantsville, Riverton, Sandy & Town of Annabella, Applicants for Intervention-Appellants. No. 26,543.

[January 31, 1973]

Appears in Petition for Writ of Certiorari, Appendix A, page 1.

Opinion.

In the United States Court of Appeals, for the Ninth Circuit.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees, Weber Basin Water Conservancy District, et al., Applicants for Intervention-Appellants. No. 26,542.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees, Salt Lake County Cottonwood Sanitary District, Cities of Grantsville, Riverton, Sandy & Town of Annabella, Applicants for Intervention-Appellants. No. 26,543.

[January 31, 1973]

Appears in Petition for Writ of Certiorari, Appendix D, pages 33-39.

Supreme Court of the United States

No. 72-1193

American Pipe and Construction Co., et al.,

Petitioners,

v.

Utah, et al.

ORDER ALLOWING CERTIORARI. Filed May 7 ----------, 1973.

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth ----------Circuit is granted.

IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1195

AMERICAN PIPE AND CONSTRUCTION CO., SMITH-SCOTT, INC., UNITED CONCRETE PIPE COMPANY, KAISER STEEL CORPORATION, UNITED STATES STEEL CORPORATION, U. S. INDUSTRIES, INC., UTAH CONCRETE PIPE COMPANY, W. R. WHITE COMPANY, a corporation,

Petitioners,

vs.

STATE OF UTAH, a body politic, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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IN THE

Supreme Court of the United States

October Term, 1972

No. .....

AMERICAN PIPE AND CONSTRUCTION CO., SMITH-SCOTT, INC., UNITED CONCRETE PIPE COMPANY, KAISER STEEL CORPORATION, UNITED STATES STEEL CORPORATION, U. S. INDUSTRIES, INC., UTAH CONCRETE PIPE COMPANY, W. R. WHITE COMPANY, all corporations,

Petitioners,

vs.

STATE OF UTAH, a body politic, *et al.*,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Petitioners, American Pipe and Construction Co., Smith-Scott, Inc., United Concrete Pipe Company, Kaiser Steel Corporation, United States Steel Corporation, U.S. Industries, Inc., Utah Concrete Pipe Company and W. R. White Company, defendants below, pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit (sometimes hereinafter referred to as the "Ninth Circuit") entered in this case on January 31, 1973 (Appendix A hereto), reversing the order of the United States District Court for the Central District of California, which denied the motion of the Respondents to intervene in the action.

Opinions Below.

The Opinion of the District Court, dated December 17, 1969, denying class action status to the instant action, is reported at 49 F.R.D. 17 (C.D. Calif. 1969) (Appendix B hereto). The Opinion of the District Court, dated March 30, 1970, denying the motions of Respondents to intervene, is reported at 50 F.R.D. 99 (C.D. Calif. 1970) (Appendix C hereto). The Opinion of the Court of Appeals for the Ninth Circuit has not yet been officially reported (Appendix D hereto).

Jurisdiction.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). An opinion of the United States Court of Appeals for the Ninth Circuit in this case was first filed and entered December 11, 1972 (Appendix E hereto). Thereafter, a petition for rehearing was filed on December 22, 1972. On January 31, 1973, the opinion and judgment dated December 11, 1972, were withdrawn, the opinion and judgment dated January 31, 1973, were entered and the petition for rehearing was denied (Appendices D and A respectively, hereto). This petition for *certiorari* is being filed within ninety (90) days of the aforesaid date of January 31, 1973.

Questions Presented.

1. Whether the United States Court of Appeals may, without a showing of abuse of discretion by the District Court, abrogate Rule 24(b), F.R.C.P., by overruling a discretionary order of the District Court made pursuant to Rule 24(b) denying motions to intervene

which were not timely and which prejudiced the rights of the original parties to the action.

2. What is the proper role of the United States Court of Appeals in reviewing a decision by a District Court made under Rule 24(b), F.R.C.P.

3. Whether the filing of an invalid class action abrogates the substantive barring provisions of Section 5(b) of the Clayton Act by tolling the statute of limitations as to members of the "non-class" in contravention of the congressional intent in enacting the statute and of the plain language thereof.

Statutes, Federal Rules and Regulations Involved.

1. *United States Code*, Title 15, Section 15 (Clayton Act of October 15, 1914, c. 323, § 4, 38 Stat. 731);

2. *United States Code*, Title 15, Section 15a (Clayton Act of October 15, 1914, c. 323, § 4A, as added July 7, 1955, c. 283, § 1, 69 Stat. 282);

3. *United States Code*, Title 15, Section 15b (Clayton Act of October 15, 1914, c. 323, § 4B, as added July 7, 1955, c. 283, § 1, 69 Stat. 283);

4. *United States Code*, Title 15, Section 16b (Clayton Act of October 15, 1914, c. 323, § 5(b), 38 Stat. 731, as amended July 7, 1955, c. 283, § 2(b), 69 Stat. 283);

5. Rule 3, Federal Rules of Civil Procedure;

6. Rule 23(a), (b) and (c) Federal Rules of Civil Procedure; and

7. Rule 24(b), Federal Rules of Civil Procedure. (See Appendix F hereto).

Statement of the Case.

On May 13, 1969, the State of Utah filed a class action complaint against Petitioners [defendants below] in the United States District Court for the District of Utah, alleging a Sherman Act conspiracy in the sale of concrete and steel pipe and seeking treble damages for purchases of those products. The State of Utah purported to represent a class described as "those public bodies and agencies of the state and local government in the State of Utah who are end users of pipe acquired from defendants, co-conspirators and others"[1] and "all other states in the Western Area, . . . which have not previously filed a similar action."[2] At the time Utah filed its class action complaint, however, only six or seven members of the purported class "had ever discussed with Utah's attorney the possibility of a pipe antitrust suit against . . . [Petitioners]."[3]

Utah's complaint alleged a price-fixing conspiracy among Petitioners continuing until the date of the filing of the complaint.[4] In fact, the present action is an extremely tardy tag-end appendage to and relies upon the same conspiracies alleged in the litigation popularly known as the "West Coast Pipe Cases" in which Respondents had every opportunity to join. Such cases were in litigation for more than 4 years and were widely publicized. By reason thereof, Respondents are charged with notice of their pendency. The tardy character of the motions to intervene is underscored by the history of this West Coast Pipe litigation. Such cases,

[1]R. 317-318 [Ex. G].

[2]R. 317-318, 320-321 [Ex. G].

[3]R. 448 [Ex. N]; *State of Utah v. American Pipe and Construction Company*, 50 F.R.D. 99, 101 (C.D. Calif. 1970).

[4]R. 327 [Ex. G].

more than 100 in number with approximately 350 claimants, included five class actions, and were pending between 1964 and 1968 in the various District Courts of the Ninth Circuit. The actions were consolidated for discovery under the Honorable Martin Pence, Chief Judge for the District of Hawaii. In such consolidated actions, Judge Pence entered an order that prospective interveners in the various class actions must file by March 31, 1966.[5]

Respondent's counsel could have sued on behalf of any respondent desiring to sue prior to the running of the statute of limitations. The Trial Court specifically noted that the plaintiff's attorneys in this case and the Attorney General in the State of Utah had been studying the purported cause of action as early as October 1968, some six months before the statute of limitations ran, and more than one year prior to December 29, 1969, when the motions to intervene at issue herein were filed.[6]

The West Coast Pipe Cases grew out of five Government criminal actions initiated in March 1964 and terminated on June 19, 1964.[7] These actions were followed by five Government civil actions filed under the False Claims Act[8] on June 23, 1964. Thereafter, the

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[5]R. 492 [Ex. Q].

[6]R. 351-52 [Ex. J].

[7]Under the literal language thereof, the barring provisions of Section 5(b) of the Clayton Act should have been triggered by such termination of the Government criminal actions, since 5(b) provides:

> "That *whenever* the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, *any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.*" (Emphasis added).

[8]15 U.S.C. 15(a).

Government civil actions were amended on October 28, 1964, to add a claim for injunctive relief under Section 4 of the Clayton Act.[9] The purpose of this amendment by the Government was to add a claim capable of tolling the statute of limitations (Section 5(b) of the Clayton Act)[10] as to private claims. On December 8, 1967, all defendants except American Pipe and Construction Company entered into a consent decree in the Government civil actions,[11] which in light of decisions from the Ninth Circuit and other jurisdictions would have caused the statute of limitations to run one year thereafter.[12] On May 24, 1968, the actions against American were also terminated.[13]

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[9]15 U.S.C. 15.

[10]15 U.S.C. 16(a).

[11]R. 229-284 [Ex. E].

[12]*See, Manny v. Warner Bros. Pictures,* 116 F.Supp. 807, 809-10 (S.D. Cal. 1953); *Century Hardware Corp. v. Powernail Co.,* 282 F.Supp. 223, 228-29 (E.D. Wis. 1968); *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.,* 193 F.Supp. 401, 403-05 (S.D. N.Y. 1961); *Grengs v. Twentieth Century-Fox Film Corp.,* 232 F.2d 325, 333 (7th Cir. 1956), *cert. denied,* 352 U.S. 871 (1956); *Tague v. Balaban,* 146 F.Supp. 356, 361 (N.D. Ill. 1956); and *Sun Theatre Corp. v. RKO Radio Pictures,* 213 F.2d 284, 292 (7th Cir. 1954).

[13]American was not a party to two of the Government civil actions—those involving steel large and small diameter pressure pipe. Accordingly, those two actions were terminated for all purposes with respect to all defendants on December 8, 1967, and the statute of limitations with respect to claims relating to those types of pipe ran long before the State of Utah filed its complaint herein. This same point was argued to the United States Court of Appeals for the Ninth Circuit, in a parallel case, *Maricopa County v. American Pipe & Construction Co., et al.,* 303 F.Supp. 77 (D. Ariz. 1969). It refused to pass on the point, holding that it had not been raised below, but reserved to appellants therein the right to assert the point before the District Court. [Unreported Decision No. 24,737, 9th Cir., August 28, 1970]. In the instant case, the same point was argued to the District Court. [R. 559-564, Ex. U]. It did not pass on the point because it decided on broader grounds the issues involved in this appeal.

Prior to the events which gave rise to the instant appeal, Judge Pence held, in *Maricopa County v. American Pipe and Construction Co., et al.*, 303 F. Supp. 77 (D. Ariz. 1969) that the statute of limitations as to private claims arising out of the Western Pipe conspiracy was tolled throughout both the Government criminal actions and the Government civil actions and remained tolled as to each co-conspirator until *May 24, 1969*, one year following the termination of the Government civil actions as to the last defendant, American. The effect of such decision was to abrogate the last defendant rule which had previously been enunciated by a district court in the Ninth Circuit.[14] By virtue of that decision, the statute of limitations as to private claims arising out of the Western Pipe conspiracy was greatly lengthened, and Utah was permitted to file its complaint on *May 13, 1969*, more than six years after the termination of the conspiracy complained of and only eleven days prior to the date on which the statute of limitations ran. During those eleven days, none of the members of the purported class alleged by Utah filed any actions or motions or in any way made their presence known to the District Court.

On August 28, 1969, the Judicial Panel on Multidistrict Litigation transferred the instant case from the District Court of Utah to the Central District of California for assignment to Judge Martin Pence, Chief Judge of the District of Hawaii, for consolidated pretrial proceedings pursuant to 28 U.S.C. Section 1407.[15] On December 4, 1969, Judge Pence, pursuant to Petition-

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[14]*Manny v. Warner Bros. Pictures, supra.*

[15]*In re West of the Rockies Concrete Pipe Antitrust Cases*, 303 F.Supp. 507, 508 (J.P.M.L. 1969).

ers' motion dated November 14, 1969, entered an order that the instant case should ". . . not be maintained as a class action and, no parties having joined therein, the class action, . . . in all respects stands terminated as of May 13, 1969, the date of the filing of the Complaint herein."[16] That order was based on the finding that "Numerous other parties, who would clearly qualify as members of the general class alleged by plaintiffs, having heretofore commenced actions on their own behalf. . . . The entities alleged by plaintiff to be members of the class described in the Complaint, in fact, are not so numerous that joinder of all such entities is impractical," and "[a] class action has heretofore shown to be inferior to other available methods for the fair and efficient adjudication of the instant controversy."[17] Such findings were made in light of the series of class actions included in the West Coast Pipe Cases in which various plaintiffs purported to represent all potential claimants, including the Respondents herein.

At the time of Judge Pence's decision respecting the class action, none of the members of the purported class had evidenced any interest in Utah's suit. Subsequent to that decision and as a result of solicitation by Utah, some seventy-odd towns, cities and other government entities [hereinafter referred to as Respondents] moved to intervene as plaintiffs in this action pursuant to either Rule 24(a)(2) or Rule 24(b)(2) of the Federal Rules of Civil Procedure. Petitioners opposed such intervention, and, following a hearing, the District Court on March 30, 1970, denied the alterna-

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[16]R. 347 [Ex. I].
[17]R. 346-347 [Ex. I].

tive motions. It specifically found that Respondents were not entitled to intervene as a matter of right pursuant to Rule 24(a)(2) because they had no legitimate interest in the outcome of Utah's action.[18] It refused to grant permissive intervention pursuant to Rule 24(b)(2) on two grounds: first, because ". . . to permit even a limited intervention on the part of petitioners for the purpose of conducting joint discovery proceedings would in the context of this case, seriously prejudice the rights of the defendants, and necessarily complicate and delay resolution of discovery problems arising in Utah's cases,"[19] and, second, because any attempt to avoid the bar of Section 5(b) of the Clayton Act by means of the Federal Rules of Civil Procedure would unlawfully abridge substantive rights of antitrust defendants.[20] It did, however, indicate that neither ground would apply to the assertion of claims arising during the four-year period preceding the filing of the

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[18]R. 450; 50 F.R.D. at 102.

[19]R. 451; 50 F.R.D. at 102.

[20]R. 460; 50 F.R.D. at 108.

Previously, in its Findings of Fact respecting the class action, the Trial Court made the following findings:

> "1. Numerous other parties, who would clearly qualify as members of the general class alleged by plaintiffs, have heretofore commenced actions on their own behalf. Between August 1964 and April 1966, over 100 separate actions allegedly arising out of this same 'Western Pipe Conspiracy' were filed in eight different United States District Courts of the Ninth Circuit. In three actions members of an alleged class in those actions purported to represent the same broad class of 'public end-users' which plaintiffs herein claim to represent, and in another action, the State of California claimed to represent all of the public end-users within said State. *All the aforesaid actions and resulting settlements were widely publicized and potential plaintiffs, throughout the 'Western area,' should have had notice thereof prior to the termination, during 1967, 1968 and 1969, of said actions.* [R. 346-347] (Emphasis added).

motions to intervene and that intervention would be granted for the limited purpose of asserting such claims.[21]

In exercising its discretion under Rule 24(b), the Trial Court made Findings of Fact as follows:

> "1. All governmental bodies in the alleged 'class' who may feel themselves injured by any alleged 'Western Pipe' conspirators had over five years from at least March 10, 1964, to May 23, 1969, to seek redress, jointly or severally. Each has at all times been represented by counsel. . . ."[22]
>
> "3. . . . [T]here is insufficient showing by any of the aforesaid petitioners that they properly relied upon the purported class action brought by the State of Utah; and the Court, therefore, finds that none of such parties did in fact rely upon such action as a class action."[23]
>
> "4. The granting of any of the aforesaid motions to intervene or to amend the Complaint would violate the rights of defendants to fairness and due process."[24]
>
> "6. *There never was a class within the meaning of Rule 23, F.R.C.P. as alleged in the Complaint herein, and the members of the purported 'class' described herein cannot claim that they started their suits, vicariously, before the tolling period expired.*"[25] (Emphasis added.)

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[21]R. 449; 50 F.R.D. at 101, n. 2.
[22]R. 444 [Ex. M].
[23]R. 444 [Ex. M].
[24]R. 444 [Ex. M].
[25]R. 445 [Ex. M].

In order to secure a final appealable order [and, no doubt, in heed of the District Court's advice that pursuit of post-1962 claims would be an expensive and fruitless venture], Respondents amended their proposed complaint in intervention so as to eliminate any claim as to the four-year period preceding December 12, 1969. Thereupon, Respondents took an appeal from the denial of their motions to intervene.

On December 11, 1972, the Ninth Circuit, by a divided court, reversed the decision of Judge Martin Pence denying intervention and apparently bottomed such decision upon the factual predicate that "the record persuasively indicates forbearance [to sue in reliance upon the class action] of appellants." In a Petition for Rehearing, Petitioners pointed out that the foregoing factual predicate of the Court of Appeals was in error and unsupported by the record. Thereafter, on January 31, 1973, the earlier opinion of the Ninth Circuit was withdrawn and, by a divided court, the Ninth Circuit eliminated any requirement of reliance by the purported class members. In its judgment entered January 31, 1973, the Ninth Circuit affirmed the order of the District Court denying intervention by Respondents pursuant to Rule 24(a), F.R.C.P., and reversed the order of the District Court denying intervention pursuant to Rule 24(b), F.R.C.P.

The effect of the Ninth Circuit's decision both is to repeal by judicial mandate Rule 24(b), F.R.C.P., and the barring provisions of Section 5(b) of the Clayton Act. In ruling that intervention should have been granted pursuant to Rule 24(b), the Ninth Circuit held that the filing of a class action, even an invalid one, tolls the running of Section 5(b) as to members of the "non-

class" despite the fact that such members did not rely upon the filing of the class action to protect their interests and were unaware of the very existence of the class action. Although the decision of the Ninth Circuit upheld the District Court's denial of intervention as a matter of right pursuant to Rule 24(a), the practical effect of the Ninth Circuit's decision is to render intervention under Rule 24(b) mandatory rather than discretionary. The crux of such decision is that whenever a class action is filed, anyone who is purportedly a member of that class must be permitted to intervene if the class is found not to be properly constituted under Rule 23 and the alleged class members would otherwise be bound by the statute of limitations from filing suit.

Moreover, the Ninth Circuit chose to ignore altogether the discretionary portion of the District Court's ruling, wherein it denied permissive intervention because of the prejudice to Respondents that would result.[36]

The decision below is so at odds with the principles established by this Court, and establishes so erroneous a precedent for the district courts of the Ninth Circuit to follow, that it requires correction. Heretofore there has been no question under Rule 24(b), F.R.C.P., that discretionary decisions of district courts could be overruled only upon a clear showing of abuse of discretion.

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[36]R. 451 [Ex. N].

REASONS FOR GRANTING THE WRIT.

I.

The Decision Below Reversing a Discretionary Ruling of the District Court Was Not Based on a Showing of Abuse of Discretion and Is, Therefore, in Conflict With the Decisions of This Court and With Other Circuits as Well as the Plain Language of Rule 24(b), F.R.C.P.

A. The Decision of the Court of Appeals Constitutes Judicial Abrogation of Rule 24(b).

Rule 24(b) of the Federal Rules of Civil Procedure provides in relevant part "In exercising its discretion the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." In reaching its decision to deny intervention by Respondents, the District Court held ". . . to permit even a limited intervention on the part of petitioners for the purpose of conducting joint discovery proceedings would in the context of this case, seriously prejudice the rights of the defendants, and necessarily complicate and delay resolution of discovery problems arising in Utah's case."[37] Such discretionary ruling was based upon all the files and records of this case and was also made in light of the history of the West Coast Pipe Cases, over which Judge Martin Pence presided, in which various plaintiffs purported to represent all potential claimants, including Respondents.

In its opinion of January 31, 1973, the Court of Appeals held:

> "The order of the District Court is affirmed as to intervention under Rule 24(a). As to inter-

[37] R. 451 [Ex. N].

> vention under Rule 24(b), the matter is remanded with instructions that the order be vacated and for further proceedings upon the motions." (Court's Opinion, p. 5, lines 20-24, Appendix D).

The decision of the Ninth Circuit is based upon the incorrect assumption that the Trial Court denied intervention solely on the basis of the statute of limitations. The Ninth Circuit simply ignored the discretionary portion of the Trial Court's decision. Such discretionary decision should be given the greatest latitude by an appellate court because the Trial Court's vast experience in the West Coast Pipe Cases makes it uniquely qualified to weigh all the factors pertinent to intervention.

By ignoring the discretionary portion of the District Court's ruling and reversing that ruling on the statute of limitations issue alone, the Ninth Circuit contradicted a long line of Supreme Court decisions including *Brotherhood of R.R. Trainmen v. Baltimore & Ohio R.R.*, 331 U.S. 519, 91 L.ed. 1646 (1947)[28] and decisions of the Sixth, Eighth and Tenth Circuits[29] that have held that discretionary decisions of the District Courts are to be reversed *only* upon a clear showing of abuse of discretion. No such showing was even undertaken by the Ninth Circuit in the action. Thus,

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[28]*See also, Allen Calculators, Inc. v. National Cash Reg. Co.*, 322 U.S. 137, 142 (1943).

[29]*See, FMC Corporation v. Keizer Equipment Company*, 433 F.2d 654, 656 (6th Cir. 1970); *Bumgarner v. Ute Tribe of Uintah and Ouray Res.*, 417 F.2d 1305, 1309 (10th Cir. 1969); *Edmondson v. State of Nebraska*, 383 F.2d 123, 127 (8th Cir. 1967); and *Stadin v. Union Electric Company*, 309 F.2d 912 (8th Cir. 1962).

the decision below is so at odds with the principles established by this Court and followed by other Circuits that it requires correction.

B. The Decision of the Majority in the Ninth Circuit Established an Unprecedented and Unsupported Standard Which Must Be Followed by All District Courts in Exercising Their Discretion Under Rule 24(b), F.R.C.P.

The standard substituted by the Ninth Circuit for the discretion given to the courts under Rule 24(b) is that whenever a class action is filed, anyone who is purportedly a member of that class must be permitted to intervene if the class is found not to be properly constituted under Rule 23 and if the alleged members of the class would otherwise be precluded from filing suit by the statute of limitations. Thus, although the Ninth Circuit pays lip service to approving and affirming the decision of the lower court that the appellants were not entitled to intervention as a matter of right under Rule 24(a), the decision converts all 24(b) discretionary interventions into mandatory intervention as of right if the statute of limitations has run against purported class members. This constitutes a judicial repeal of Section 24(b), F.R.C.P., as it relates to purported class members.

C. The Ninth Circuit's Decision Contravenes the Mandate of Rule 24 That the Trial Court Shall Consider Whether Intervention Will Prejudice the Original Parties.

Rule 24(b), F.R.C.P., mandates that the district court, in exercising its discretion thereunder: ". . . shall consider whether the intervention will unduly delay or

prejudice the adjudication of the rights of the original parties."[30] The Ninth Circuit paid no heed to the Trial Court's finding that intervention would seriously prejudice the original parties. Prejudice to the defendants is underscored by the history of the West Coast Pipe Cases. After widespread publicity and requests for intervention, a settlement was made upon the payment of more than $21,000,000 to approximately 350 claimants. United States Steel Corporation, Kaiser Steel Corporation and Martin-Marietta paid approximately $4,000,000 more than their pro rata share of the settlement. Such double payment by the defendants would not have been made but for the understanding of defendants that all claims arising from the alleged conspiracy were settled [R. 490, *et seq.*]. Thus, the Trial Court arrived at the inevitable conclusion that to allow intervention of litigants who slept on their rights for five years would unduly prejudice the rights of defendants herein. The Ninth Circuit's decision in favor of such dilatory litigants is in disregard of the clear mandate of Rule 24(b) against intervention that will prejudice the rights of the original parties. Moreover, this clearly erroneous standard for District Courts to follow needs correction and the proper role of the Court of Appeals must be defined so that it does not substitute its judgment for the discretion of the Trial Court.

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[30]*See, Stadin v. Union Electric Company*, 309 F.2d 912 (8th Cir. 1962).

II.

This Case Presents Important Questions Regarding the Effect of the Filing of Class Actions on Statutes of Limitation, Particularly Section 5(b) of the Clayton Act, Which Questions Have Not Been Settled by This Court but Should Be. Decisions of Courts in Other Circuits Show the Need for Definitive Clarification.

The decision of the United States Court of Appeals for the Ninth Circuit is unique. This Court has never held that the filing of an invalid class action tolls any statute of limitation including the statute applicable to private antitrust damage actions (Section 5(b) of the Clayton Act, which is hereinafter referred to as "Section 5(b)"). Moreover, no other court has indicated even by way of dictum that an invalid class action tolls or should toll the statute of limitations with respect to claims of individuals who have not relied upon the filing of the class action to protect their rights and who are not even aware of the existence of the class action. The unprecedented decision of the Ninth Circuit, if left undisturbed, would not only contravene the congressional intent underlying Section 5(b) of the Clayton Act but would make the time period of every statute of limitation open-ended with no discernable period of repose.

By the simple expedient of alleging the existence of a class, a plaintiff can, under the Ninth Circuit's decision, toll the statute of limitations governing claims of would-be class members for such period of time as is required for the District Court to determine that the action cannot be maintained as a class action. Upon a determination by the District Court that there is not a proper class action, members of the non-class are free

to bring separate actions of their own or to move to intervene in the original action. Assuming, for example, that the applicable statute of limitations would have run one month after the filing of the class action, under the Ninth Circuit's decision, the would-be class members of the non-class have a month following the final negative determination regarding the class action in which to file their complaints or motions, even though a year or more may have passed since the original complaint was filed.

In five published opinions, the lower courts have previously considered the question of whether or not the filing of an invalid class action tolls the statute of limitations for claims of would-be class members.

See, Abercrombie v. Lum's, Inc., 345 F.Supp. 387, 394 (S.D. Fla. 1972);

[In denying a class action, the court pointed out by way of dictum (345 F.Supp. 394, n. 13): "The statute of limitations would be no bar to those franchisees who could show that they in fact relied on the pendency of this case as a class action. Buford v. American Finance Co., 333 F.Supp. 1243 (N.D.Ga. 1971); *see* Ratner v. Chemical Bank, *supra* at 1017, n. 4; Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 460-461 (E.D.Pa. 1968). As to any others, Rule 23 obviously was not designated to revive stale claims."]

Buford v. American Finance Co., 333 F.Supp. 1243, 1252 (N.D. Ga. 1971);

[In denying the class action the court stated (333 F.Supp. 1251): ". . . the plain truth

is that in many cases Rule 23(b)(3) is being used as a device for the solicitation of litigation. This is clearly an 'undesirable result' which cannot be tolerated."].

Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412, 414 (S.D. N.Y. 1972); [Although it cut off the rights of class members against whom the statute of limitations had run, the court denied a class action and pointed out (54 F.R.D. 414):

"(5) No other member of the proposed class has evinced an interest in the lawsuit or brought a similar suit elsewhere, and the one-year limitation period in 15 U.S.C. § 1640 (e) has long since expired."

This affords a striking parallel to this action. In the instant suit, interveners evinced no interest in this action prior to the time they were solicited to sue by counsel for the State of Utah.]

Rogers v. Coburn Finance Corp. of DeKalb, 54 F.R.D. 417, 419 (N.D. Ga. 1972);

[In refusing to vacate a prior order terminating the class action, the court stated (54 F.R.D. 419): ". . . as this court pointed out in *Buford*, the members of the class plaintiff seeks to represent may still bring their own individual actions and may move this court to toll the applicable one-year statute of limitations period upon a showing that they purposely refrained from filing their own actions within the time limit in reliance upon the maintenance of a class action in the instant case."]

Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 460-61 (E.D. Pa. 1968).

[The court held that the action "may be maintained as a class action" on behalf of certain classes of plaintiffs. In its opinion, the court stated as follows, 43 F.R.D. 460-61: "Where the class action determination is affirmative, the court is merely declaring that the action may be 'maintained' as a class action, and it seems reasonably clear that this determination relates back to the date of filing of the complaint. (For this reason, I reject the defendants' contention that an affirmative determination in these cases would constitute an invalid enlargement of the statute of limitations). But where the determination is negative, and a class action is, in the words of the Committee, 'stripped of its character as a class action' (39 F.R.D. at p. 104), it does not necessarily follow that the case must be treated as if there never was an action brought on behalf of absent class members."]

At most, the distillate of the foregoing decisions is that the claims of would-be members may not be barred by the statute of limitations if such class members can establish that they relied upon the class action to protect their claims. The decision of the Ninth Circuit herein is the only one to date that holds that reliance is immaterial and the statute of limitations is tolled as to all claims. Such decision clearly creates a conflict between the Circuits. Inasmuch as the Court has never

made a definitive ruling under Rule 23 as to the effect of the filing of a class action, whether valid or invalid, on the tolling of the statute of limitations as to purported class members and inasmuch as the conflict created between the Circuits will introduce confusion into the administration of the innumerable class actions pending throughout the federal judicial system, it is both appropriate and exceedingly important that the Court resolve the matter.

The decision below will also have a great effect in the enforcement of various substantive federal statutes. Extension of the limitations' periods created by Congress will interfere with the congressional purposes that led to the adoption of such statutes. In the enforcement of antitrust laws such is clearly the case. In adopting Section 5(b) Congress clearly stated its intent to eliminate the various tolling exceptions that had unduly prolonged the statute of limitations governing antitrust actions. House Report Number 422 sets forth the type of situation that Section 5(b) would eliminate:

> "In the private treble damage action of *Christensen v. Paramount Pictures,* the court held that the period of limitations had been tolled with respect to the action in question for a period of 12 years by virtue of the wartime tolling statute and the pendency of a Government antitrust suit. *The extent to which the litigation in this case was extended by virtue of various tolling provisions of Federal Law is disclosed by the following table, indicating the inadvisability of prolonging the limitation period in such instances.*
>
> "*While the committee considers it highly desirable to toll the statute of limitations during a*

> *Government antitrust action and to grant plaintiffs a reasonable time thereafter in which to bring suit, it does not believe that the undue prolongation of proceedings of this type is conducive to effective and efficient enforcement of the antitrust laws.* The present bill would assure all plaintiffs of at least 4 years from the time their cause of action accrued in which to institute suit. It would also guarantee every plaintiff at least a year from the close of a Government antitrust suit to prepare his case and file his complaint. But in cases where the plaintiff's action had been suspended by the pendency of a Government antitrust proceeding, *he would be required to bring his action* either (a) within the suspension period, *i.e.*, within 1 year after the Government suit had terminated, or (b) within 4 years after his cause of action accrued."[31]

The decision of the Ninth Circuit is in square contradiction to the foregoing statute of repose since it eliminates the requirement that the litigant "*bring his action either (a) within the suspension period, i.e.,* within 1 year after the Government suit had terminated or (b) within 4 years after his cause of action accrued." Similarly, Congress saw fit to limit private claims for violations of the securities laws to a one-year period.[32] A variety of other federal statutes of limitation are also within the ambit of each of the rulings of the Ninth Circuit at issue herein. (Examples thereof [twenty-six in number] are set forth in Appendix G hereto.) The policy

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[31]H. R. Rep. No. 422, April 1955, 84th Cong. 1st Sess. 2. (1955 (Emphasis added)).

[32]15 U.S.C. §§ 77m, 77www, 78i and 78r.

underlying such statute would clearly be thwarted by the tolling exception created by the Ninth Circuit in the instant action. As a result of the decision herein, the Ninth Circuit has engrafted yet another judicially created exception onto the various statutes of limitation that have been established by Congress. Furthermore, it has ignored altogether the well-established principle that rules of procedure such as Rule 23 cannot be employed to abridge or enlarge substantive rights.[83] Indeed, the Ninth Circuit has itself held in other cases that "the right to bar an action for lapse of time is a substantive right."[84] It follows that the decision of the Ninth Circuit at issue herein is in direct contradiction with the principles enunciated by this Court:[85]

> ". . . The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. . . . Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

The decision of the Ninth Circuit in this action is not only unprecedented and in contravention of clearly

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[83] *Philadelphia Electric Co. v. Anaconda American Brass Co.*, 43 F.R.D. 452, 460 (E.D. Pa. 1968).

[84] *John E. King v. Alaska Steamship Co.*, 431 F.2d 994, 996 (9th Cir. 1970).

[85] *The Harrisburg*, 119 U.S. 199, 214 (1886), *rev'd on other grounds, Moragne v. States Marine Line*, 398 U.S. 375, 26 L.ed.2d 339, 361, 90 S.Ct. 1772 (1970).

expressed congressional intent, it also lacks altogether any supporting legal rationale. In cases where a would-be class member has relied upon the class action to protect his claims, certain of the lower court cases have considered the class action and statute of limitations question and have refused to adopt the reliance rationale.[36] Other cases have considered such issue and have adopted such reliance rationale[37] Assuming *arguendo* that it is equitable to grant such relying class members the benefit of the filing date of the class action, there is no rationale to support the decision of the Ninth Circuit. Would-be class members who did not rely on the filing of the class action to protect their claims, who were not even aware of its existence, should not be granted the benefit of the filing date of the class action. Such a rule will not promote fairness. A person who has slept on his rights beyond the period of limitations set by Congress no longer has an enforceable claim. It is not the province of the courts to enlarge that period of limitation or revive such claims. The decision below certainly will not promote the efficient administration of justice. Quite the contrary, it will encourage the solicitation of claims by plaintiffs who file class actions. It will compound the problem of client solicitation which has caused the Federal Courts to enter orders in class action cases prohibiting either party from contacting any of the purported class members. Indeed, a proposed form of such court order is contained in the Manual for Complex and Multidistrict Litigation (§§ 1.61 & 1.62) which is distributed to all of the Federal District Courts. The decision below will exacer-

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[36]*Ratner v. Chemical Bank New York Trust Company*, 54 F.R.D. 412, 414 (S.D. N.Y. 1972).

[37]*Philadelphia Electric Co. v. Anaconda Am. Brass Co.*, *supra*.

bate the problem of over use and abuse of the class action device. The decision below encourages the filing of invalid as well as valid class actions. It enables the filing plaintiff to solicit would-be class members for many months until a negative class action decision is reached. Then, he is able to bring motions to intervene on behalf of those he has solicited. In this case, the so-called "interveners" did not initiate intervention but were solicited to intervene by counsel for the State of Utah.

An examination of the exact reasoning by which the Ninth Circuit reached its decision below reveals not only the patent error of such reasoning but the importance of eliminating the decision as a precedent. The Ninth Circuit's reasoning can be summarized as follows:

> Rule 3 of the Federal Rules of Civil Procedure provides that "A civil matter is commenced by filing a complaint with the court". Utah filed a timely suit. If the action had proceeded as a class action, the great weight of authority even under old rule 23 would hold that members of the class could assert their claims without having filed prior to the running of the statute of limitations. Inasmuch as class members who do not participate in the action are now bound by the judgment therein under the current Rule 23, they should be allowed to intervene without satisfying the statute of limitations when class action status is denied.

Such reasoning does not follow. Rule 3 of the Federal Rules may provide that the filing of a complaint commences a civil action, but it does not indicate on behalf of whom the civil action is commenced—the filing party alone or others. Decisions of the lower courts

under old Rule 23 with respect to valid class actions are clearly inapplicable to invalid class actions under present Rule 23. Moreover, this Court has never ruled as to the validity of lower court decisions under Rule 23 which have allowed class members in a properly filed class action to assert claims without independently satisfying the statute of limitations. More important, however, the final step in the Ninth Circuit's reasoning is a total *non-sequitur*. The fact that under present Rule 23 non-participating class members are bound by the judgment in an action has no bearing upon any statute of limitations issue. It is certainly not unfair to bar a would-be class member from asserting claims that are barred by the statute of limitations. He is simply not prejudiced; he has no enforceable claim.

Conclusion.

This Court has never decided or given guidance on the effect of Rule 23 on the provisions of Section 5(b) and other statutes of limitation. The instant case presents a unique and compelling opportunity to do so inasmuch as the Ninth Circuit has reached a decision on the matter that is in conflict with the decisions in other Circuits, that will elongate substantially all federal statutes of limitation, that is clearly incorrect and is designed to serve no beneficial end. The decision below, if left undisturbed, would interject confusion into the administration of class actions and promote the solicitation and prosecution of questionable claims. In addition, the decision below clearly fails to adhere to the long established abuse of discretion standard and should be reversed for that reason alone. . . .

In the interests of justice and the effective administration of the federal judicial system, particularly with respect to class actions, this Court should grant *certiorari* in order to rectify the errors below.

Respectfully submitted,

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APPENDIX "A."

Order.

In the United States Court of Appeals, for the Ninth Circuit.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees, Weber Basin Water Conservancy District, et al., Applicants for Intervention-Appellants. No. 26,542.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees, Salt Lake County Cottonwood Sanitary District, Cities of Grantsville, Riverton, Sandy & Town of Annabella, Applicants for Intervention-Appellants. No. 26,543.

Before: MERRILL and KILKENNY, Circuit Judges, and TAYLOR, District Judge

Petition for rehearing is denied.

The opinion of this court heretofore filed herein December 11, 1972, is withdrawn. In lieu thereof the opinion filed this day will be substituted.

APPENDIX "B".

Decision on Defendants' Motion Opposing Class Action.

State of Utah, on behalf of itself and all others similarly situated, Plaintiffs, v. American Pipe and Construction Company; United Concrete Pipe Corporation; Utah Concrete Pipe Company; W. R. White Company; United States Steel Corporation; Kaiser Steel Corporation; Smith-Scott, Inc.; U.S. Industries, Inc., Defendants. No. 69-1964.

United States District Court C.D. California, Dec. 17, 1969.

PENCE, District Judge.

On May 13, 1969, the State of Utah filed this "western pipe" Sherman § 1 antitrust action against certain concrete and steel pipe manufacturing companies, seeking treble damages and injunctive relief on its own behalf and in addition, claimed to represent a class described as (1) "those public bodies and agencies of state and local government in the State of Utah who are end users of pipe acquired from the defendants, co-conspirators and others"[1] and (2) those states in the Western Area which have not previously filed a similar action.[2]

Defendants have moved for an order that the action not be maintained as a class action.

Plaintiff denominated "those states in the Western Area" as being the states of "Wyoming, Nevada and Idaho", and includes along with them the public bodies and agencies of the states and local governments in

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[1]Complaint, para. 1, pp. 1-2.
[2]Complaint, para. 2, p. 2.

those several states and Utah who are end users of pipe acquired from the defendants, etc. Appended to plaintiff's memorandum in support of its class action allegations is a list of what this court can only determine to be every incorporated whistle-stop, hamlet, village, town, city, county, and water and sewer improvement district in Utah, Nevada, Wyoming and Idaho. The several collections of whistle-stops, etc., total some 300 for Utah, 240 for Idaho, 270 for Wyoming, and 31 for Nevada.[8] Plaintiff did not represent that each was actually an end user of pipe—plaintiff just made a list.

As indicated in the chronological history of the western pipe cases set forth in this court's decision of August 1, 1969, in Maricopa County v. American Pipe and Construction Co. et al., 303 F.Supp. 77 (D.Ariz. 1969), the government's criminal complaint against some of the defendants named in the instant action was filed on March 10, 1964, and on June 23, 1964, the government's civil actions were started.

As this court held in *Maricopa,* the government's criminal and civil actions tolled the statute of limitations until May 24, 1969. Beginning in August 1964, Clayton § 4 treble damage antitrust actions were thereafter filed by the states of Hawaii, California, Oregon, Washington and Arizona against American Pipe and Construction Company, United Concrete Pipe Corp., U.S. Steel, Kaiser Steel, Smith-Scott Inc., and U.S. Industries, all defendants herein, as well as other defendants, charging exactly the same general antitrust

[8]The Nevada list includes the City of Las Vegas, which on January 9, 1968, filed its own private western pipe antitrust civil action in No. 1107-LV, District of Nevada, against American Pipe and Construction Company, Martin-Marietta Corp., and United Concrete Pipe Co., and concluded the same by way of settlement on November 20, 1968.

conspiracies, etc., as set forth in the *Utah* complaint. In each of the complaints of the states of Hawaii, California, Oregon and Washington, and of the United States, as well as in three other of the 100 separate end user actions filed "in the Western Area", these actions were denominated "class actions" under the old (pre 1966) Rule 23. F.R.Civ.P. This court, treating them as spurious class actions, permitted intervention by all aggrieved public bodies of those several states and gave ample time for joinder. The sum total of the actual parties joining in the class actions, in those four states, plus the state and other public bodies in Arizona, as well as the City of Las Vegas, Nevada, and other private end user actions, totaled some 350 plaintiffs. All of the parties involved in the "class actions" have settled their claims and the actions have been dismissed. The United States Government has also settled its end user claims arising out of the "western pipe" conspiracy, as have all other but some one-half dozen late, late filing individual claimants.

Massive discovery, with depositions in depth of the knowledgeable employees of the major conspirators, together with centralized deposit of thousands of documents relative to the underlying alleged conspiracy, is long since ended. The publicity regarding the suits—covering interim rulings by this court over the past five years, published in CCH Trade Regulation Reports, BNA Law Week, and West's Federal Supplement, together with newspaper publicity anent filing of suits and settlement sums received by public bodies, has been spread throughout the western states during the past five years.

The court will take judicial notice that in November of 1968 at the conference of the National Association

of State Purchasing Agents, held in Honolulu, representatives of the State Purchasing Agents of Nevada and Utah were present when this judge delivered an address covering in depth some of the problems of antitrust litigation in the western pipe cases. This court will also take judicial notice that Lewis Markus, Chief, Economic Section, Antitrust Division, United States Department of Justice, has been, as he himself admits, "somewhat of a fixture on the program of each of the Association's annual meetings since about 1961," and has reported to the state purchasing agents on problems of identical bidding and significant antitrust cases brought in each preceding year. The court will also take judicial notice that there is a National Association of Attorneys General which holds annual conventions. The court will also take judicial notice that each of the public bodies who joined in the western pipe litigation actions above indicated, had its own private attorney, although the litigation was headed up in almost every instance through the states' attorneys general. In those cases, as in this, in most instances, private antitrust counsel was employed to assist the states.[4]

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[4]The instant problem was argued on December 1, 1969. On that morning, an Assistant Attorney General for the State of Idaho filed an affidavit (its first and only) in support of the class action, in which the following appears:

"The Attorney General of the State of Idaho has heretofore relied exclusively upon Special Assistant Attorneys General appointed from private law firms to represent the state in antitrust matters. Prior to May 13, 1969, the Special Assistant Attorney General informed ROBERT M. ROBSON that the State of Idaho did not sustain sufficient damage as a result of the alleged violations in the above entitled matter to warrant the expense involved in instituting an independent action on behalf of the State of Idaho. Relying upon this advice, the Idaho Attorney General did not file a complaint against the above named Defendants.

"Information subsequently came to the attention of the Idaho Attorney General that * * * Utah had filed * * * suit * * *."

It is with the above background that the court here approaches the threshold problem facing every court in all Rule 23(b) (3), F.R.Civ.P., problems, viz.: "As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." F.R. Civ.P., Rule 23(c) (1).

The complaint, on its face (even though its allegations but narrowly escape violating the minimum requirements of Rule 23(b), in that it barely goes beyond repetition of the language of the Rule, (see Gillibeau v. City of Richmond et al., Ninth Circuit, 417 F.2d 426 (1969)), when considered with the list of some 800 inferentially potential plaintiffs referred to above, would appear, superficially, to meet the first prerequisite under Rule 23(a), viz., that the class is so numerous that joinder of all members is impracticable—but more of that hereafter. The allegations that there are questions of law and fact common to the claims, likewise would appear to have some merit in that as this court would judicially notice, from its five-year experience dealing with this same western pipe problem, some threads of a common "western pipe" conspiracy involving some of the here named defendants have been found in each of the states and localities involved in the actions heretofore filed. Also the court would notice that the parties involved in the alleged conspiracy shifted from not only state to state but locality to locality, as did the effect of the conspiratorial acts upon prices. The court notes, for example, that the Utah Concrete Pipe Company and the W. R. White Company, defendants herein, have never been named in any other complaint heretofore filed in the western pipe end user cases and that in their moving

papers in the instant class action problem they allege that they have not operated outside of the state of Utah. An inference to be drawn from the above, of course, would be that other parties defendants might well have to be joined in the other three states affected by the alleged class action. Even if this occurred, however, the court would recognize that there would probably be questions of law and fact common to the "class" claims insofar as the underlying alleged conspiracy of the defendants named herein other than White and Utah Concrete. Thus, on its face, the complaint would apparently meet the second prerequisite of Rule 23(a).

Moreover, the claims of the state of Utah for injury and damages resulting from the alleged conspiracy would probably be generally typical of the claims of the states of Idaho, Wyoming and Nevada, but this court's past experience in the "western pipe" cases has shown that the percentage of artificial price increase, resulting from absence of meaningful competition and stemming from the alleged conspiracy, has varied from locality to locality, not only between states but between localities within the several states. While this might nevertheless meet the prerequisites of Rule 23(a) (3), it would create a question as to whether or not the representative party could adequately protect the interests of the several members of the class. This inner conflict was heretofore illustrated by the difference between Washington Public Power Supply System claims, as contrasted with those of the State of Washington,[5] wherein the State of Washington settled

[5]Washington Public Power Supply System v. American Pipe and Construction Co. et al., Civil No. 6568, W.D.Wash.; State of Washington et al. v. American Pipe and Construction Co. et al., Civil No. 3157, W.D.Wash. [280 F.Supp. 802].

out and the Washington Public Power went to trial on its separate and independent theory of damages. But perhaps this too might not be fatal to the plaintiffs' class action.

What *is* fatal to plaintiffs' class action allegations are the raw facts of the past five years litigation on almost precisely the same facts and problems of law set forth in plaintiffs' complaint, and this prior litigation is a criteria which this court must consider in resolving the "threshold problem." Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2 Cir., 1968).

At the time the various "class actions" were heretofore filed in the various states, as previously indicated they were "spurious class actions", thereby necessitating joinder. Suit and complaint notice was given to public bodies throughout the states of Hawaii, California, Oregon and Washington by the several attorneys general to all potential plaintiffs in those several states. The end result of such notices was that thereafter there was a joinder of all public bodies which had claims against the several "western pipe" defendants. This court had no difficulty whatsoever in handling the conjoined problems of members of the so-called classes.

Therefore, although here plaintiffs have alleged that the class is so numerous that joinder of all the 800 listed potential members is impracticable, this court cannot accept that numerical list as in any way truly representative of the number of public bodies in the

several states who were actually affected by the alleged conspiracy—nor is it so alleged. Based upon population and population expansion in those states over the past twenty years, the court could take judicial notice that the number of end users in Hawaii, Arizona, California, Washington and Oregon should at least be more than seven times as many as the total number of end users in the four states named in the present "class." In any event, the court can but conclude that the number of public entities in Utah, Wyoming, Nevada and Idaho who might have been injured by the alleged conspiracy could not possibly exceed the 350 cases heretofore filed by end users in the other states of the "Western Area." From prior actual experience in like cases involving the same alleged conspiracy, this court could not find that number so numerous that joinder of all members was impracticable, nor can it conclude that a class action here would achieve economies of time, effort and expenses or promote any more uniformity of decision than the joinder method heretofore proved successful.[9] To the contrary, the fact of joinder and intervention has made the determination of actual parties plaintiffs and defendants, as well as the percentage of damage determination, much simpler, easier and more practicable than would have been any class action procedure under the present Rule 23(b) (3).

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[9]Notes of the Advisory Committee, 39 F.R.D. 73,102-103 (1966).

The court therefore finds that the first prerequisites to a class action have not and cannot here be met. Defendants' motion that this action not be maintained as a class action is GRANTED.

This court cannot pass by, without commenting thereon, the statement of Gerald R. Miller, counsel for plaintiffs, set forth in his affidavit in support of class action, page 2:

> "*If they had thought the law to be otherwise, the Attorney General in his official capacity would certainly have urged each of these governmental entities to file an individual action.* It was determined, however, that such a procedure would do little more than complicate this action with a multitude of individual plaintiffs, each seeking a similar relief based upon a common violation of the law." (Emphasis added.)

The court notes from plaintiff's affidavits that the Attorney General of the State of Utah and Attorney Miller sometime in October 1968—over six months before the statute of limitations ran—started a study of the western pipe conspiracy. Any detailed study of the litigation then and theretofore pending in the western pipe cases would have disclosed the facts which this court has above recited. A study of the law on the application of a class action to pipe cases as reflected in City of New York v. International Pipe & Ceramics Corp. (44 F.R.D. 584, S.D.N.Y., April 16, 1968) reported in Trade Regulation Reports shortly thereafter, and in Federal Rules Decisions in November 1968, should also have raised a caveat in Utah's determination of the law which might be applied to the present litigation. It should have been unquestioned on the part of the

plaintiff's attorneys that individual action by affected parties, particularly the states, large cities and other large public entities in the Western Area, should have been taken long before any class action was belatedly filed in this case, if in fact any of them believed the alleged conspiracy had injured them.

Plaintiffs' attention is also called to Dolgow v. Anderson, 43 F.R.D. 472, 484 E.D.N.Y. January 3, 1968 (Weinstein, J.): Alternative devices of "joinder, intervention, consolidation, and the test case"—"presuppose 'a group of economically powerful parties who are obviously able and willing to take care of their own interests individually through identical suits or individual decisions about joinder or intervention' [quoting from Frankel in 32 Antitrust L.J. 295, 298 (1966)]." The court feels sure that plaintiffs' counsel would agree that his client, as well as most, if not all, members of the so-called class would properly fall into the group described by Judges Weinstein and Frankel.

APPENDIX "C".

Decision on Motions to Intervene, Amend, Etc.

State of Utah, on behalf of itself and all others similarly situated, Plaintiffs, v. American Pipe and Construction Company, United Concrete Pipe Corporation, Utah Concrete Pipe Company, W. R. White Company, United States Steel Corporation, Kaiser Steel Corporation, Smith-Scott, Inc., U.S. Industries, Inc., Defendants. Civ. No. 69-1964-MP.

United States District Court, C. D. California. March 30, 1970.

PENCE, Chief Judge.

The motions before this court are but sequelae of this court's decision and order of December 17, 1969, 49 F.R.D. 17, that this Sherman 1 antitrust case, filed as a class action by the State of Utah under Rule 23(b)(3), F.R.Civ.P., was not to be so maintained. As indicated in that prior ruling, Utah filed this Sherman 1 antitrust suit on May 13, 1969, just eleven days before the statute of limitations in these "Western Pipe" cases ceased to be tolled under Clayton 5(b) (15 U.S.C. § 16(b)). In those eleven days none of the moving parties now before this court filed any actions or motions, nor did any do so until after this court's December 4, 1969 decision. Now, after solicitation to do so by the State of Utah, some 60-odd towns and cities, and water and sewer districts in Utah (petitioners), through Utah's counsel, have: (1) moved, pursuant to Rule 24(a)(2) or in the alternative to Rule 24(b)(2), F.R.Civ.P., to intervene as plaintiffs in the Utah action; and as an alternative, (2) Utah has moved for leave to amend its complaint by adding these petitioners as parties-plaintiff;

(3) as an alternative to that, Utah has moved that the court alter or amend its order of December 4, 1969, pursuant to Rule 23(c) (1), F.R.Civ.P., so as to reinstate this as a class action as to those same petitioners. (4) As yet another alternative, Utah has moved the court for an order directing that notice be given to all members of the class alleged in plaintiff's original complaint advising them of the decision of the court to terminate the class action and then giving them a reasonable time in which to intervene in the present action. Coupled with this is the supplemental motion that the court's order of December 4 be vacated pending such notice and intervention "within a reasonable time" thereafter. (5) Utah also in the alternative moves that the court amend its prior order by adding "the magic language" from 28 U.S.C. § 1292(b) so as to facilitate an interlocutory appeal from its December 4 decision.

The affidavits of the petitioners indicate that in February of 1969 attorneys for only six or seven thereof had ever discussed with Utah's attorney the possibility of a pipe antitrust suit against the defendants herein, or had relied upon the Utah class action to protect their interests.[1] Each of the petitioners alleges that the alleged conspiracy has continued to the date of the filing of the complaint by the State of Utah. All motions have been fully briefed and argued.

While Utah and petitioners allege that the "Western Pipe" conspiracy has continued on until May 13, 1969,

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[1]These include the Metropolitan Water District of Salt Lake City, Salt Lake City, Salt Lake County Sanitary District, Salt Lake City Suburban Sanitary District, Central Weber Sewer Improvement District, City of Ogden, and Bona Vista, claiming that they have purchased some $5 million of pipe from the defendants or others during the period 1946-1964. Discovery in prior pipe litigation indicates that the relevant damage period for the alleged conspiracy was between 1954 and the end of 1962.

the problem underlying all of the motions is that of the bar of the statute of limitations to the petitioners' complaints. Underlying every motion is the desire of the petitioners to avoid that bar by any procedural route. As determined by this court in Maricopa County v. American Pipe and Construction Co. et al., 303 F. Supp. 77 (D.Ariz.1969), the tolling of the statute of limitations on the government's "Western Pipe" conspiracy cases ceased on May 24, 1969. Since only the State of Utah, of all the parties now before this court, filed its suit prior to that date, unless by one means or another the present parties can somehow get under the now dropped portcullis and inside the golden castle of the Clayton Act, any Sherman 1 claims for any injuries prior to the four years preceding the filing of these motions are barred.[2]

Motions to Intervene Under Rule 24.

Each of the petitioners urged that they should be permitted to intervene as a matter of right under Rule 24(a) (2), maintaining that they have such an interest relating to the conspiracy charged in the Utah action that the disposition of that action may impair or impede their ability to protect that interest. They urge

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[2]Anent the above, although petitioners have pled that the conspiracy continued on until May 13, 1969, not even Utah seems to take that portion of its complaint seriously. For all antitrust (money) purposes, the only evidence so far developed in the massive prior litigation involving the same alleged conspiracies indicate with almost absolute certainty that any such conspiracies terminated at least by the end of 1962. Digging into all Sherman 1 claims for the four years immediately prior to May 13, 1969 would, therefore, to an equally almost absolute certainty, produce nothing but a dry and expensive hole for the petitioners, with no monetary recovery whatsoever. (The court here is not prejudging; it is prognosticating.) While the court cannot foreclose the petitioners from the questionable pleasure of digging such a hole, it will here bypass that segment of petitioners' allegations.

the court should adopt the "liberalized" interpretation given this section by Cascade Natural Gas Corp. v. El Paso Natural Gas Co., 386 U.S. 129, 87 S.Ct. 932, 17 L.Ed.2d 814 (1967); Smuck v. Hobson, 132 U.S. App.D.C. 372, 408 F.2d 175 (1969); and Nuesse v. Camp, 128 U.S.App.D.C. 172, 385 F.2d 694 (1967). While the advisory committee to the 1966 amendment in its note to subdivision (a) stated: "If an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene * * *,[3] this court feels that Rule 24(a) (2) has been given its optimum application in *Cascade*. In *Cascade*, *Smuck* and *Nuesse*, each of the intervenors were attempting to implement important and well-defined public policies—a status not enjoyed by petitioners here.

It is only in those cases where the prospective intervenor appears to have a sufficient stake in the outcome and enough to contribute to the resolution of the controversy, that a right to intervene arises. Utah and petitioners admit that a judgment for or against Utah would in nowise preclude the petitioners or any of them from filing independent actions against the same defendants based upon the same alleged conspiratorial acts as set up by Utah. No decision in Utah's case would be res adjudicata as to any portion of their several causes of action. Thus, not one of the petitioners here has any real stake in the outcome of the Utah case, per se. Nor would their presence contribute to the resolution of Utah's claims. As indicated above, it is manifest that the underlying reason for the petitions to intervene is the desire of petitioners to get their

[3]3B Moore's Federal Practice ¶ 24.01 [10].

complaints related back to May 13, 1969, and thereby circumvent the bar of the statute of limitations.

The petitioners here manifestly have no such interest in the outcome of Utah's litigation as would mandate this court to permit them to intervene under Rule 24 (a) (2).

The alternative, permissive intervention under Rule 24(b) (2), is not as easy of resolution. Petitioners' claims might well have questions of fact in common with Utah's—apparently the same parties-defendant, same alleged conspiracy, same time-damage periods, etc. It is manifest, however, that to permit even a limited intervention on the part of petitioners for the purpose of conducting joint discovery proceedings would in the context of this case, seriously prejudice the rights of the defendants, and necessarily complicate and delay resolution of discovery problems arising in Utah's case.

The seven petitioners[4] who in their bare bones affidavits indicate some reliance on Utah's class action to toll the statute for them, find some support in dicta in Judge Fullam's excellently written decision in *Philadelphia Electric*,[5] viz., that those members of the non-class who relied upon the class action to protect their interests should be allowed to intervene and their actions relate back to the date the class action was filed, even though, meanwhile, the statute had run. It appears to this court, however, that within the limited context of violations of the antitrust laws, there is a very serious doubt as to the validity of any such holding on intervention in class actions as found in *Philadelphia Electric*

[4]See n. 1.

[5]Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1968).

or *Nisley*[6] under either Rule 23 or Rule 24. This doubt stems from 28 U.S.C. § 2072, the statute enabling the Supreme Court to make the present Rules of Civil Procedure. "Such rules shall not abridge, enlarge or modify any substantive rights * * *".

The courts that have permitted tolling of the statute by the filing of class actions in antitrust actions have consciously or otherwise entered into an "interest-balancing" approach to the problem.[7] Judge Frank, who in York v. Guaranty Trust Co.[8] said that "to hold that such noteholders [who were justified in believing that the plaintiffs' class action was begun on their behalf] cannot, as to lapse of time, have the benefit, by intervention, of the institution of the suit by plaintiff would be to convert the Rule [Old Rule 23 (a) (3)] into a trap", was but balancing off the interests of the parties. This same interest-balancing approach was considered by Judge Friendly in his concurring opinion in Escott v. Barchris Constr. Corp.,[9] in commenting on Judge Frank's "trap" argument in connection with an old spurious class action. The courts which have allowed class actions under the New Rule 23 to toll the statute in antitrust suits, likewise have taken an interest-balancing approach,[10] justifying the tolling in order to implement the congressional intent that the language of Clayton 5(b) must be given its broadest application in favor of enabling private

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[6]Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10 Cir. 1961), appeal dismissed sub nom., Wade v. Union Carbide, 371 U.S. 801, 83 S.Ct. 13, 9 L.Ed.2d 46 (1962).

[7]See 13 Villanova L.R. 370, 382.

[8]143 F.2d 503, 529 (2 Cir. 1944).

[9]340 F.2d 731, 735 (2 Cir. 1965).

[10]This same approach was also adopted by the majority under the old rule in *Union Carbide*, n. 6, 300 F.2d at 590.

litigants to reap every benefit that they possibly can in order to encourage the enforcement of antitrust laws by private litigation,[11] and in spite of verbal recognition of the substantive nature of the statute of limitations under §§ 4B and 5(b)[12] nevertheless have determined that when there is a conflict between implementing the Rules and implementing the antitrust statute of limitations policy balancing demands that the antitrust statute of repose must be violently disturbed by continued tolling—tolling solely authorized by judicial interpretation of Rule 23. This court is not satisfied that such interpretation is permissible under 28 U.S.C. § 2072.

In enacting the antitrust laws, Congress created a novel statutory right on behalf of plaintiffs, tortious and penal in nature, but stemming from no common law right, and providing that those injured by violations of these strictly American theory-of-economics statutes may recover treble damages plus cost of suit, and a reasonable attorney's fee. 15 U.S.C. § 15. Moreover, Congress has specially set up a four year statute of limitations for such antitrust actions, § 4B, and added

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[11] *Maricopa, supra,* 303 F.Supp. at 85. *Cf.* also; *Philadelphia Electric,* n. 5, 43 F.R.D. at 460, and State of Minnesota v. United States Steel Corp., 44 F.R.D. 559, 574 (D.C.Minn. 1968).

[12] *Philadelphia Electric,* n. 5, 43 F.R.D. at 460:

> "Surely, it was not the intention of the Committee, the Supreme Court, or the Congress that the 1966 amendments to Rule 23 should have any effect upon the period of limitations established by Congress, 15 U.S.C. §§ 15b, 16(b), as amended. Any such purpose would run counter to the statutory prohibition against rules which 'abridge, enlarge or modify any substantive right', 28 U.S.C. § 2072. The strong presumption of validity of these rules, Hanna v. Plumer, 380 U.S. 460, 461, 471, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), requires this court to apply the rule as written * * *."

on to that statute an additional period during which the statute is tolled by the institution of a civil or criminal proceeding by the United States to prevent, restrain or punish violations of any of the antitrust laws. There is even further tolling because the courts have held[13] that as to 15 U.S.C. § 15b, the rule that fraudulent concealment tolls a statute of limitations "is read into every statute of limitations."

In even further encouragement and protection to antitrust plaintiffs, the courts have held that the institution of successive governmental actions under § 5(b), if filed while the statute is still tolled, continues the tolling process beyond the conclusion of prior government actions.[14] Moreover, the statute is not only tolled as to the defendants named in the government's actions, but it is also tolled as to all co-conspirators whether named in the actions or not,[15] and it remains tolled as to *all* conspirators even if some have settled out or otherwise concluded their case with the government.[16] All of these expanding constructions of the statute of limitations have been made within the context of the antitrust acts themselves.

In the instant case, the fraudulent concealment factors allegedly present, coupled with successive governmental actions and delayed settlement of the govern-

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[13]Holmberg v. Armbrecht, 327 U.S. 392, 397, 66 S.Ct. 582, 90 L.Ed. 743 (1946); Esplin v. Hirschi, 402 F.2d 94, 103 (10 Cir. 1968); Public Service Co. of New Mexico v. General Electric Co., 315 F.2d 306, 311 (10 Cir. 1963).

[14]*Maricopa, supra,* 303 F.Supp. at 86.

[15]Leh v. General Petroleum Corporation, 382 U.S. 54, 86 S. Ct. 203, 15 L.Ed.2d 134 (1965); New Jersey Wood Finishing Co. v. Minnesota Mining & Mfg. Co., 332 F.2d 346, 354 (3 Cir. 1964), aff'd 381 U.S. 311, 85 S.Ct. 1473, 14 L.Ed.2d 405 (1965).

[16]Maricopa, *supra,* 303 F.Supp. at 87.

ment suits by only one of the present defendants has carried back the period of defendants' potential liability to at least 1954 and tolled the statute for over six years following the government indictments of March 1964. If "the sole reason for [these tolling provisions] of the Clayton Act was to stimulate private antitrust suits * * * and aid such private suitors",[17] it would appear that this court has completely implemented congressional intent in these "Western Pipe" cases.

The policy behind the federal enactment of an antitrust statute of limitations with an accompanying statute on tolling was declared by Congress as follows:

> "This bill makes several important changes in the tolling provisions of existing law. As presently written, section 5 of the Clayton Act tolls the statute of limitations with respect to private treble-damage suits during the pendency of a suit by the United States to punish or restrain violations of the antitrust laws. This period of tolling is continued by the present bill with several modifications.
>
> "There are many instances where the statute of limitations as to a private cause of action may nearly have expired before suit is instituted by the Government under the antitrust laws. Although the statute is tolled during the pendency of the proceedings brought by the United States, the plaintiff in a treble-damage action may find himself hard pressed to reap the benefits of the Government suit if, upon its conclusion, he has but a short time remaining to study the Government's case, estimate his own damages, assess the strength and validity of his suit, and prepare and file his

[17] *New Jersey Wood Finishing*, n. 15, 332 F.2d at 354.

complaint. To alleviate such difficulties, the present bill would extend the tolling period not only for the duration of the Government's antitrust suit, but for 1 year thereafter. *This would guarantee all plaintiffs an adequate period in which to take advantage of Government antitrust proceedings.*

"While the committee believes it important to safeguard the rights of plaintiffs by tolling the statute during the pendency of Government antitrust actions, it recognizes that in many instances the long duration of such proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts. The committee believes the provision of this bill will *tend to shorten the period* over which private treble-damage actions will extend by requiring that the plaintiff bring his suit within 4 years after it accrued or within 1 year after the Government's case has been concluded.

"While the committee considers it highly desirable to toll the statute of limitations during a Government antitrust action and to grant plaintiff a reasonable time thereafter in which to bring suit, it does not believe that the undue prolongation of proceedings is conducive to effective and efficient enforcement of the antitrust laws. The present bill would assure all plaintiffs of at least 4 years from the time their cause of action accrued in which to institute suit. It would also guarantee every plaintiff at least a year from the close of a Government antitrust suit to prepare his case and file his complaint. But in cases where the plain-

tiff's action had been suspended by the pendency of a Government antitrust proceeding, he *would be required to bring his action* either (a) within the suspension period, i.e., within 1 year after the Government suit had terminated, or (b) within 4 years after his cause of action accrued." (Emphasis added.)[18]

"*In addition to establishing a uniform statute of limitations,* the bill strikes at *another* problem flowing therefrom, namely, the tolling of such a statute. At the present time, the tolling of the statute, with respect to private treble damage suits, exists during the pendency of a suit by the United States. This period is continued by the present bill. However, in order that a person might not be deprived of the benefit of the Government suit because of an abrupt termination of the Government's litigation, the bill provides for extension of the tolling period not only for the duration of the Government suit but also for 1 year thereafter. Thus the injured parties are provided with an adequate time in which to take advantage of the Government's antitrust proceedings.

"*There is an added precaution also provided for* in this bill to prevent undue and lengthy prolongation of stale claims. By requiring a plaintiff to institute his suit either within 4 years from the date of injury or within 1 year after the final decree in a Government case, the plaintiffs will not be afforded time to procrastinate and delay." (Emphasis added.)[19]

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[18]S.Rep. No. 619, 6/21/1955 [To accompany H.R. 4954], 2 U.S. Cong. & Admin. News 1955, pp. 2332-2333.

[19]101 Cong.Rec. Part 4, p. 5130, 84th Cong. 1st Sess., Congressman Keating, House Committee on the Judiciary.

This court has previously said that when Congress enacted 15 U.S.C. § 16(b) tolling the 4-year statute of limitations of § 4B, it made it "manifest that in encouraging the enforcement of the antitrust laws by private litigation, tolling of the statute was more important than the repose established thereby."[20] That statement may be utilized only within the context of the interpretation of the extent of tolling permitted by 15 U.S.C. § 16(b), not as an inference of the application of Rule 23 to that section.

Any "interest-balancing" approach is inapplicable in this antitrust action if either the statutory bar of § 4B (15 U.S.C. § 15b) or § 5(b) (15 U.S.C. § 16(b)) created a substantive right for antitrust defendants. This problem of rights created by statute, which gives the right of action and also fixes the time within which such action may be brought, was fully considered by Chief Justice Waite in The Harrisburg, 119 U.S. 199, 214, 7 S.Ct. 140, 147, 30 L.Ed. 358 (1886), where, in determining if a suit *in rem* could be brought in admiralty under a state statute permitting recovery of damages for wrongful death on navigable waters which also fixed the time within which such action might be brought, wrote:

> "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within 12 months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all. * * * Time has been made of the essence of the

[20] *Maricopa, supra,* 303 F.Supp. at 85.

right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are therefore to be treated as limitations of the right."

This same rule was invoked in Ragan v. Merchants Transfer Co., 337 U.S. 530, 533, 69 S.Ct. 1233, 1235, 93 L.Ed. 1520 (1949), where Justice Douglas said of a state law and its statute of limitations vis-a-vis Rules 3 and 4:

> "Since that cause of action is created by local law, the measure of it is to be found only in local law. * * * It accrues and comes to an end when local law so declares. * * *
>
> "We can draw no distinction in this case because local law brought the cause of action to an end after, rather than before, suit was started in the federal court. In both cases local law created the right which the federal court was asked to enforce. In both cases local law undertook to determine the life of the cause of action. We cannot give it longer life in the federal court than it would have had in the state court without adding something to the cause of action. * * *
>
> "It is argued that the Kansas statute in question is not an integral part of the Kansas statute of limitations. But the Court of Appeals * * * has held to the contrary." (Footnote omitted.)[21]

Judge Learned Hand in Bomar v. Keyes, 162 F.2d 136, 138, 140 (2 Cir. 1947), in also considering

[21]This court does not view Hanna v. Plumer, 380 U.S. 460, 85 S.Ct. 1136, 14 L.Ed.2d 8 (1965), as disturbing the above statement of applicable law.

the statute of limitations in relation to Rules 3 and 4, covered the obverse:

> "We [here] have not to deal with a case in which the limitation is annexed as a condition to the very right of action created. * * * and when a right is not so conditioned the statute of limitations is treated as going to the remedy."

If the analyses of Justices Waite and Douglas and Judge Learned Hand on the bar of limitations in the context of rights created by statute are valid, then within the purview of the § 5(b) at least, any enlargement of tolling of that statute by virtue of the Rules cannot rationally be categorized as procedural.

The substantive-procedural dichotomy does not present a completely new problem. It has been considered by other courts but in connection with the effect of the doctrine of fraudulent concealment on § 4B. *E.g.*, Kansas City, Missouri v. Federal Pacific Electric Co., 310 F.2d 271, 282 (8 Cir. 1962); Atlantic City Electric Co. v. General Electric Co., 312 F.2d 236 (2 Cir. 1962); Public Service Co. of New Mexico, *supra*, n. 13. Each court held that Holmberg, *supra*, 327 U.S. at 397, 66 S.Ct. at 585, 90 L.Ed. 743, reads the principle that fraudulent concealment of a cause of action tolls a statute of limitations "into every federal statute of limitation", and since Congress did not provide to the contrary by unambiguous language, the rule applied to § 4B.[22] This rule appears now to be too well settled for dispute.[23]

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[22]This court has not ignored the carefully prepared and documented opinion of Judge Mathes in the *Kansas City, Missouri* case. As indicated above, the problem presented to that court, however, was not within the context of enlarging the antitrust

(This footnote is continued on next page)

Tolling of §§ 4 B and 5 (b) and the Enabling Acts

By judicial equitable fiat, § 4B is tolled by fraudulent concealment. By the legislative ukase of § 5(b), it is further tolled by government suit. In the context of the facts of this case, plaintiff would have the tolling period specified by § 5(b) additionally tolled by virtue of the Rules of Civil Procedure.

The Enabling Acts (28 U.S.C. §§ 2072, 2074, civil and bankruptcy rules; and 18 U.S.C. § 3771, criminal rules) confer rule-making power to the Court only over procedure and not substance. The test, as stated in Sibbach v. Wilson & Co., 312 U.S. 1, 14, 61 S.Ct. 422, 426, 85 L.Ed. 479 (1940), is "whether a rule really regulates procedure, * * * the judicial process for enforcing rights or duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them." If Congress had but enacted § 4B to take the place of the hodge-podge of state statutes of limitation and omitted § 5(b), the substantive-procedural rationale of *Kansas City, Missouri* would have more validity. When, however, with no state statutes or common law precedent before it, Congress in § 5(b) created new and specific tolling conditions and periods, and unequivocally "*Pro*-tionally toll § 5(b) via the Federal Rules of Civil

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tolling period of § 5(b) by virtue of the Federal Rules of Civil Procedure, but rather an enlargement of § 4B by virtue of equitable doctrine against fraudulent concealment. This court, however, finds the *entire* Congressmen Murray-Quigley discourse concluding without anything genuinely definitive having been *agreed* upon. This court, like Judge Moore in *Atlantic City Electric Co., supra,* 312 F.2d at 243-244, believes that Chairman Celler and the Committee reports more accurately state congressional definition and intent of both §§ 4B and 5(b).

[23]Atlantic City v. General Electric Co., supra, was a 6 to 1 *en banc* opinion.

vided, however", that when the statute of limitations was suspended thereunder, "any action * * * shall be forever barred unless commenced either [within the period of suspension or] within four years after the cause of action accrued", the validity of comparing state-federal statutes of limitation[24] within the milieu of substantive-procedural rights becomes questionable. In § 5(b) Congress not only created new rights for antitrust plaintiffs but also clearly created obverse rights for antitrust defendants.

It is not necessary for this court to determine whether or not the doctrine in *York*, *Hanna* and *Sibbach*, *supra*, would here control. From its legislative history this court can only conclude that in enacting §§ 4B and 5(b) together with a unique tolling statute, Congress enmeshed into the Clayton Act its own statute of limitations applicable only to equally unique antitrust causes of action and calculated to give what Congress said was sufficient time for any aggrieved parties to discover violations, gain all the benefits they could from federal actions thereon, and file their own complaints. Specifically tailored as they were for antitrust litigation, this court cannot but determine that § 5(b) certainly, and § 4B rationally, were intended by Congress to become an integral part of the entire antitrust legislative scheme.

It thus appears to this court that the only statutory "right" given to a defendant in an antitrust case, viz., the right to interpose the bar of limitations to attempted tolling of § 5(b) by Rule 23, F.R.Civ. P., is a substantive right—as a necessary segment of the total sphere of antitrust legislation. Any attempt to addi-

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[24] *Kansas City, Missouri, supra*, 310 F.2d at 282.

tionally toll: §5(b) via the Federal Rules of Civil Procedure would appear to be an abridgement of that substantive right.

As the Court stated in Holmberg v. Armbrecht,[25] *supra:* "Traditionally and for good reasons, statutes of limitation are not controlling measures of *equitable* relief", and "a suit in *equity* may lie though a comparable cause of action at law would be barred." (Emphasis added.) That same Court also said: "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive."[26]

This is not an equitable action nor do any equities appear for any petitioners. As stated above, all have regularly retained counsel. The attorneys for the "relying seven" are, presumably, no country squires, but rather, sophisticated "big city" counsel, under constant retainer as such by moneyed clients. Nothing appears in any of their affidavits to indicate why they should have "relied" on Utah's counsel and suit, rather than immediately proceed to process their own claims and suits. None was foreclosed from filing his own suit by the fact that Utah's attorneys planned to file a class action.

This court can but conclude that within the statutorily created antitrust universe § 5(b) cannot be re-tolled by any Rule to permit relation back of their several causes of action by intervenors attempting to intervene in either class or non-class actions filed for violation of the antitrust laws, after the tolling period of § 5(b) has ended.

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[25]327 U.S. at 396, 66 S.Ct. at 584.

[26]327 U.S. at 395, 66 S.Ct. at 584.

The above conclusion carries even more thrust here, where this court has determined that the action may not be maintained as a class action. The class action, in the words of the Committee,[27] has been "stripped of its character as a class action." Since there never was a class, the members of the "class" cannot claim that they started their suits, vicariously, before the tolling period expired. There being no class, there is no connecting link available, even for the "relying seven", for attachment of any "relation back" hook.

Leave to intervene, with relation back of their actions to May 13, 1969, is therefore DENIED to *all* 60-odd intervenors-petitioners.

(2) Motion for Leave to Amend and Add Co-parties Plaintiff

The object of Utah's alternative (2) motion for leave to amend and add intervenors as co-parties plaintiff under Rule 15, too, is to get the intervenors' (as additional parties) complaints related back to May 13, 1969, and "under the portcullis." While Rule 15(c) permits an amendment changing a party *against* whom a claim is asserted, under certain circumstances, to relate back—if the statute has not run, the Advisory Committee Notes of 1966 state:

> "The relation back of amendments changing plaintiffs is not expressly treated in revised Rule 15(c) since the problem is generally easier. Again the chief consideration of policy is that of the statute of limitations, and the attitude taken in revised Rule 15(c) toward change of defendants extends by analogy to amendments changing plaintiffs."[28]

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[27]Committee on Rules of Practice and Procedure.

[28]3 Moore's Fed.Practice 15.01[9], p. 811.

A new party-plaintiff cannot be added by amendment after the statute has run.[29] This motion too must be denied.

(3) Motion to Reinstate Class Action

Utah's alternative motion (3) is that this court alter its order of December 4, 1969, under Rule 23(c) (1), F.R.Civ.P., to reinstate a class action, just for the present petitioners. Nothing contained in Utah's moving papers adds any new element or basis upon or from which this court would feel itself either impelled or compelled to change either its findings, conclusions or decision of December 4. The fact that the states of Wyoming, Idaho and Nevada and the public bodies therein who have purchased pipe during the relevant years of the "Western Pipe Conspiracy" appear in this alternative motion to have been abandoned by Utah, also in no wise changes any basis of this court's December 4, 1969 decision. This third alternative is likewise DENIED.

(4) Motion to Vacate Court's Non-Class Order and Permit Intervention Relating Back

Utah's alternative motion (4) is that the court vacate its December 4 order of non-class suit, direct that notice be given to the some 800 "class members" of this court's decision of "non-class action" and permit those who want to, to intervene within a reasonable time, with their intervention relating back to May 13, 1969. While Utah urges that "Fairness and due process re-

[29]Iocono v. Anastasio, 79 F.Supp. 378 (S.D.N.Y. 1948); Aarhus Oliefabrik A/S v. A. O. Smith Corp., 22 F.R.D. 33 (E.D.Wis. 1958); Murfkan v. Kahn, 11 F.R.D. 520 (S.D.Fla. 1951); Messelt v. Security Storage Co., 14 F.R.D. 507 (D.Del. 1953); Kerner v. Rackmill, 111 F.Supp. 150 (M.D.Pa. 1953).

quire that at the very least the class members be given notice of the court's decision and a reasonable opportunity to join in this action",[30] Utah bypasses the fact that defendants as well as plaintiff have equal rights to "fairness and due process." This court has already determined the due process aspects of the case. Leaden procrastination and delay in filing their own complaints on the part of "class members" may not here, *ipso facto,* be transmuted into golden participation by the emotional wand of "fairness". This motion is but another attempt to evade the statutory bar. Unfortunately for plaintiff, for the reasons heretofore set forth it too fails, and the motion is DENIED.

(5) Motion for Certification for Interlocutory Appeal

As a last motion (5), Utah asks that this court's order of December 4, 1969, be certified for interlocutory appeal.

This court is not prepared so to act, at this time at least. It did not in December last, nor does it now feel, that on the facts before it there is any substantial ground for a difference of opinion as to how this antitrust case should be treated or handled. Utah, having filed its claim in time, will have its day in court. All governmental bodies in the alleged "class" who may feel themselves injured by any alleged "Western Pipe" conspirators, have had over six years within which to seek redress, jointly or severally. Each has at all times been represented by counsel; many of the cities and water and sewer districts have operating budgets in the 7 to 9 figure dollar bracket. All are—or should be —sophisticated in both competitive bidding practices as

[30]Plaintiff's Memorandum in Support of Motions, p. 15.

well as litigation. No "creditors' bill" situations are here involved. All of those factors as well as more went into and compelled this court's decision of December 4, 1969.

The motion must be DENIED.

As the pleadings now stand, since petitioners have *alleged* a cause of action for the four years preceding December 12, 1969, when these motions were filed, this court could not now dismiss their complaints. In futuro, it can only rule on problems, discovery, etc., for periods after, as distinguished from prior to December 12, 1964, in the context of the statutory bar for any transactions or claims arising prior thereto. Therefore as to all parties-plaintiff now before the court, the court's rulings do not with finality dispose of their cases. If, however, petitioners' claims were limited to pre-December 12, 1964 transactions, different legal aspects would arise.

Defendants will prepare the necessary order.

APPENDIX "D".

In the United States Court of Appeals, for the Ninth Circuit.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees, Weber Basin Water Conservancy District, et al., Applicants for Intervention-Appellants. No. 26,542.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees, Salt Lake County Cottonwood Sanitary District, Cities of Grantsville, Riverton, Sandy & Town of Annabella, Applicants for Intervention-Appellants. No. 26,543.

On Appeal from the United States District Court for the Central District of California.

Before: MERRILL and KILKENNY, Circuit Judges, and TAYLOR, District Judge*

MERRILL, Circuit Judge:

Weber Basin Water Conservancy District and other applicants for intervention have taken this appeal from a final order[1] of the District Court denying their applications to intervene in the action below brought by the State of Utah.

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*Honorable Fred M. Taylor, Senior United States District Judge for the District of Idaho, sitting by designation.

[1]Initially, the decision of the court below, reported in 50 F.R.D. 99 (1970), did not present an appealable final order. Applicants had alleged a cause of action including the four years prior to December 12, 1969, the date when the motions to intervene were filed, and as to those allegations, the statute of limitations had not run. 50 F.R.D. at 110. Applicants subsequently amended their complaint to eliminate allegations of conspiracy less than four years before the filing of the motion to intervene, thereby permitting a final order denying intervention to be filed.

That action was brought May 13, 1969,[2] as a class action against appellees, alleging a Sherman Act conspiracy in the sale of concrete and steel pipe and seeking treble damages with respect to purchases of those products. The State of Utah purported to represent a class described as "those public bodies and agencies of state and local government in the State of Utah who are end users of pipe acquired from defendants * * *." The action relied upon the same conspiracies involved in protracted litigation popularly known as the West Coast Pipe Cases, growing out of five criminal and five civil actions initiated by the Government in 1964 and ultimately terminated May 24, 1968.

On December 4, 1969, on motion of appellees, the court entered an order that the action shall "not be maintained as a class action"; that the class action "in all respects stands terminated as of May 13, 1969, the date of the filing of the complaint herein." The order was based on findings made under Rule 23, Federal Rules of Civil Procedure,[3] that members of the class

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[2]Action was brought in the District Court of the District of Utah. On July 28, 1969, the Judicial Panel on Multidistrict Litigation transferred the case from the District of Utah to the Central District of California for assignment to Judge Martin Pence, Chief Judge of the District of Hawaii, who had been actively involved as judge in the West Coast Pipe Cases (see text, *infra*).

[3]"(*a*) *Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(*b*) *Class Actions Maintainable.* An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * * *

(B)(3) the court finds that the questions of law or fact common to the members of the class predominate over any ques-

described in the complaint are "not so numerous that joinder of all such entities is impractical"; and that experience in the West Coast Pipe Cases had demonstrated that a class action was "inferior to other available methods for the fair and efficient adjudication of the instant controversy."[4]

Eight days later, on December 12, 1969, appellants filed motions to intervene as plaintiffs, as of right, under Rule 24(a)(2), or by permission, under Rule 24(b)(2). On March 30, 1970, the court handed down a decision denying intervention,[5] which was followed by formal findings of fact, conclusions of law, and order, from which order this appeal is taken.

We agree with the District Court that appellants had no right to intervention under Rule 24(a) since, as a practical matter, they would not be affected by any potential recovery by Utah. Fed.R.Civ.P. 24(a)(2).

However, denial of appellants' motion for permissive intervention under Rule 24(b) was, in our judgment, erroneous.

The court felt that the limitations of §5(b) of the Clayton Act, 15 U.S.C. §16(b), barred appellants from assertion of their claims. That section suspends the running of the statute of limitations against private Clayton Act suits during the pendency of suits initiated by the Government (based on the same viola-

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tions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

[4]The order was supported by decision filed December 17, 1969, *Utah v. American Pipe & Constr. Co.*, 49 F.R.D. 17, 21 (C.D. Cal. 1969).

[5]*Utah v. American Pipe & Constr. Co.*, 50 F.R.D. 99 (C.D. Cal. 1970).

tions) and for one year thereafter.[6] The section then emphasizes the converse:

> "*Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

In this case §5(b) served to suspend limitations for one year from May 24, 1968 (termination of the Government suits), and ran (or would have run) against these appellants May 24, 1969. The section requires that an action be "commenced * * * within the period of suspension * * *." Rule 3, Fed.R.Civ.P., provides that "A civil matter is commenced by filing a complaint with the court." This suit, as we have noted, was commenced by Utah eleven days before the running of the statute. If the action had proceeded as a class action, we have no doubt that appellants' claims would satisfy §5(b).[7]

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[6] "(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part of any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter * * *."

[7] Even before Rule 23 was amended in 1966, most courts held that even as to "spurious" class actions, a plaintiff could intervene after the timely filing of a class action without independently satisfying the applicable statute of limitations. *DePinto v. Provident Security Life Ins. Co.*, 323 F.2d 826 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 589-90 (10th Cir. 1961), *cert. dismissed*,

The District Court read §5(b) as not only granting a tolling period but as warning that further delay was not to be tolerated. The court stated in its decision:

> "This court can but conclude that within the statutorily created antitrust universe §5(b) cannot be re-tolled by any [Federal] Rule [of Civil Procedure] to permit relation back of their several causes of action by intervenors attempting to intervene in either class or non-class actions filed for violation of the antitrust laws, after the tolling period of §5(b) has ended." 50 F.R.D. at 108.

We cannot agree. Appellants sought only to present to the court in the very form the court had indicated it preferred the very claims already tendered to the court on their behalf by Utah.

Maintenance of the class action was denied not for failure of the complaint to state a claim on behalf of the members of the class (the court recognized the probability of common issues of law and fact

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371 U.S. 801 (1962); *York v. Guaranty Trust Co.*, 143 F.2d 503, 529 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945). *Contra, Pennsylvania Co. for Insurances v. Deckert*, 123 F.2d 979 (3d Cir. 1941). The objection to the majority rule was that it encouraged "one-way intervention"; it allowed a prospective plaintiff to sit on the side lines, await the outcome of the suit, and then if the class action was successful, intervene and collect. If the action was unsuccessful, and a potential class member had not intervened, he was not bound. This gap was corrected in 1966 and Rule 23 now provides that all class members are bound by the judgment unless they elect not to be included as class members. The strongest argument against the majority position having been eliminated, where a class action is maintained, intervention must be allowed without independent satisfaction of a statute of limitations. *See Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452 (E.D. Penn. 1968).

respecting the underlying conspiracy); not for lack of standing of the representative,[8] or for reasons of bad faith or frivolity. It was denied because, considering the size of the class and the nature of the claims of its members, it was felt that those claims could more efficiently be entertained through joinder of the claimants rather than by class treatment.

Under these circumstances, we hold that as to members of the class Utah purported to represent, and whose claims it tendered to the court, suit was actually commenced by Utah's filing. The claims of appellants were then before the court and the only question was as to the manner in which they should be entertained on the merits.[9] The requirements of §5(b) were then met.

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[8]*See, e.g., Hobbs v. Police Jury of Morehouse Parish,* 49 F.R.D. 176 (W.D. La. 1970) (per curiam).

[9]One of the grounds stated in the order denying maintenance of class action was taken from Rule 23(a)(1) relating to the right to sue:

> "One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable."

It is argued that this deprives the plaintiff of any power to tender class claims where joinder is practicable, and thus that it cannot be said that the claims of class members had been tendered or were before the court at all.

We cannot accept this reasoning. There may well be a case where the class is so limited in number that practicability of joinder appears as matter of law. This case, however, would appear to be one where ascertainment of practicability was in exercise of judicial discretion. The rule did not preclude the court from entertaining suit as a matter of law; rather, the court declined to entertain it by exercise of its discretion. This being so, it must follow that in so far as §5(b) is concerned the class was before the court until its exercise of discretion. To hold otherwise would be to empower the court, through the discretionary determination of whether suit had been commenced or not, to render the statute of limitations applicable or not, as it sees fit. Considerations of order and certainty dictate that such questions should be resolved by rule of law rather than exercise of discretion.

Suit having been commenced by a filing of the complaint, members of the class were safely in court and their claims protected against the bar of §5(b) until, by order of the court, they were ejected from the suit. The statute thus was tolled by commencement of suit and did not again commence to run until entry of the order denying class action.

This being so, it did not lie within the discretionary province of the District Court to deprive them of the eleven days balance of time remaining to them under §5(b). If the order, through legal fiction, is to project itself backward in time it must fictionally carry backward with it the class members to whom it was directed, and the rights they presently possessed. It cannot leave them temporally stranded in the present.

We conclude that it was error for the court to hold that appellants' petitions for intervention were barred by §5(b).

The order of the District Court is affirmed as to intervention under Rule 24(a). As to intervention under Rule 24(b), the matter is remanded with instructions that the order be vacated and for further proceedings upon the motions. Costs are awarded to appellants.

State of Utah v. American Pipe & Construction Co., et al, Nos. 26542 and 26543.

KILKENNY, Dissenting:

I believe the trial judge exercised a legal discretion and that the appellants, on the record before us, have not shown an abuse of his appraisal of the issues presented on the applications for intervention. I would affirm on the basis of the trial judge's decision. *State of Utah v. American Pipe & Construction Co.*, 50 F.R.D. 99 (C.D. Cal. 1970).

APPENDIX "E".

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees. Weber Basin Water Conservancy District, et al., Applicants for Intervention-Appellants. No. 26,542.

State of Utah, Plaintiff, vs. American Pipe & Construction Company, et al., Defendants-Appellees, Salt Lake County Cottonwood Sanitary District, Cities of Grantsville, Riverton, Sandy & Town of Annabella, Applicants for Intervention-Appellants. No. 26,543.

[December 11, 1972].

On Appeal from the United States District Court for the Central District of California.

Before: MERRILL and KILKENNY, Circuit Judges, and TAYLOR, District Judge.*

MERRILL, Circuit Judge:

Weber Basin Water Conservancy District and other applicants for intervention have taken this appeal from a final order[1] of the District Court denying their appli-

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*Honorable Fred M. Taylor, Senior United States District Judge for the District of Idaho, sitting by designation.

[1]Initially, the decision of the court below, reported in 50 F.R.D. 99 (1970), did not present an appealable final order. Applicants had alleged a cause of action including the four years prior to December 12, 1969, the date when the motions to intervene were filed, and as to those allegations, the statute of limitation had not run. 50 F.R.D. at 110. Applicants subsequently amended their complaint to eliminate allegations of conspiracy less than four years before the filing of the motion to intervene, thereby permitting a final order denying intervention to be filed.

cations to intervene in the action below brought by the State of Utah.

That action was brought May 13, 1969,[2] as a class action against appellees, alleging a Sherman Act conspiracy in the sale of concrete and steel pipe and seeking treble damages with respect to purchase of those products. The State of Utah purported to represent a class described as "those public bodies and agencies of state and local government in the State of Utah who are end users of pipe acquired from defendants * * *." The action relied upon the same conspiracies involved in protracted litigation popularly known as the West Coast Pipe Cases, growing out of five criminal and five civil actions initiated by the Government in 1964 and ultimately terminated May 24, 1968.

On December 4, 1969, on motion of appellees, the court entered an order that the action shall "not be maintained as a class action"; that the class action "in all respects stands terminated as of May 13, 1969, the date of the filing of the complaint herein." The order was based on findings made under Rule 23, Federal Rules of Civil Procedure,[3] that members of the class

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[2]Action was brought in the District Court of the District of Utah. On July 28, 1969, the Judicial Panel on Multidistrict Litigation transferred the case from the District of Utah to the Central District of California for assignment to Judge Martin Pence, Chief Judge of the District of Hawaii, who had been actively involved as judge in the West Coast Pipe Cases (see text, *infra*).

[3]"*(a) Prerequisites to a Class Action.* One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

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described in the complaint are "not so numerous that joinder of all such entities is impracticable"; and that experience in the West Coast Pipe Cases had demonstrated that a class action was "inferior to other available methods for the fair and efficient adjudication of the instant controversy."[4]

Eight days later, on December 12, 1969, appellants filed motions to intervene as plaintiffs, as of right, under Rule 24(a)(2), or by permission, under Rule 24(b)(2). On March 30, 1970, the court handed down a decision denying intervention,[5] which was followed by formal findings of fact, conclusions of law, and order, from which order this appeal is taken.

We agree with the District Court that appellants had no right to intervention under Rule 24(a) since, as a practical matter, they would not be affected by any potential recovery by Utah. Fed.R.Civ.P. 24(a)(2).

However, denial of appellants' motion for permissive intervention under Rule 24(b) was, in our judgment, erroneous.

The court felt that the limitations of §5(b) of the Clayton Act, 15 U.S.C. §16(b), barred appellants from assertion of their claims. That section suspends the run-

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(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * * *

(B)(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy."

[4]The order was supported by decision filed December 17, 1969, *Utah v. American Pipe & Constr. Co.*, 49 F.R.D. 17, 21 (C.D.Cal. 1969).

[5]*Utah v. American Pipe & Constr. Co.*, 50 F.R.D. 99 (C.D. Cal. 1970).

ning of the statute of limitations against private Clayton Act suits during the pendency of suits initiated by the Government (based on the same violations) and for one year thereafter.[6] The section then emphasized the converse:

> "*Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

In this case §5(b) served to suspend limitations for one year from May 24, 1968 (termination of the Government suits), and ran (or would have run) against these appellants May 24, 1969. The section requires that an action be "commenced * * * within the period of suspension * * *." Rule 3, Fed.R.Civ.P., provides that "A civil matter is commenced by filing a complaint with the court." This suit, as we have noted, was commenced by Utah eleven days before the running of the statute. If the action had proceeded as a class action, we have no doubt that appellants' claims would satisfy §5(b).[7]

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[6] "(b) Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter * * *."

[7] Even before Rule 23 was amended in 1966, most courts held that even as to "spurious" class actions, a plaintiff could intervent after the timely filing of a class action without independently

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The District Court read §5(b) as not only granting a tolling period but as warning that further delay was not to be tolerated. The court stated in its decision:

> "This court can but conclude that within the statutorily created antitrust universe § 5(b) cannot be re-tolled by any [Federal] Rule [of Civil Procedure] to permit relation back of their several causes of action by intervenors attempting to intervene in either class or non-class actions filed for violation of the antitrust laws, after the tolling period of § 5(b) has ended." 50 F.R.D. at 108.

We do not regard what appellants sought by intervention as a "retolling" of the statute. Rather, they sought to present to the court in the very form the court had indicated it preferred the very claims already tendered to the court on their behalf by Utah.

Maintenance of the class action was denied not for failure of the complaint to state a claim on behalf

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satisfying the applicable statute of limitations. *DePinto v. Provident Security Life Ins. Co.*, 323 F.2d 826 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964); *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561, 589-90 (10th Cir. 1961), *cert. dismissed*, 371 U.S. 801 (1962); *York v. Guaranty Trust Co.*, 143 F.2d 503, 529 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945). *Contra, Pennsylvania Co. for Insurance v. Deckert*, 123 F.2d 979 (3d Cir. 1941). The objection to the majority rule was that it encouraged "one-way intervention"; it allowed a prospective plaintiff to sit on the side lines, await the outcome of the suit, and then if the class action was successful, intervene and collect. If the action was unsuccessful, and a potential class member had not intervened, he was not bound. This gap was corrected in 1966 and Rule 23 now provides that all class members are bound by the judgment unless they elect not to be included as class members. The strongest argument against the majority position having been eliminated, where a class action is maintained, intervention must be allowed without independent satisfaction of a statute of limitations. *See Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); *Philadelphia Elec. Co. v. Anaconda Am. Brass Co.*, 43 F.R.D. 452 (E.D. Penn. 1968).

of the members of the class; (the court recognized the probability of common issues of law and fact respecting the underlying conspiracy) not for lack of standing of the representative,[8] or for reasons of bad faith or frivolity. It was denied because, considering the size of the class and the nature of the claims of its members, it was felt that those claims could more efficiently be entertained through joinder of the claimants rather than by class treatment.

Under these circumstances, we hold that as to members of the class Utah purported to represent, and whose claims it tendered to the court, suit was actually commenced by Utah's filing. The claims of appellants were then before the court and the only question was as to the manner in which they should be entertained on the merits. The requireents of §5(b) were then met.

This being so, it did not lie within the discretionary province of the court to dismiss those claims out of hand. By subjecting them to the bar of the statute, the court did just that.

As stated in Wright and Miller, Federal Practice and Procedure (1922) §1786:

> "The court should be particularly sensitive to potential statute of limitations problems whenever a negative determination as to maintenance of a class action is made."

To prevent the creation of prejudice in this respect, denial of class action should in this case have been given the same unprejudicial effect as the dismissal of a complaint with leave to amend; opportunity should have

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[8]*See, e.g., Hobbs v. Police Jury of Morehouse Parish*, 49 F.R.D. 176 (W.D. La. 1970) (per curiam).

been afforded to accomplish the procedural alternatives which the District Court itself suggested and which were the sole basis for denial of class action.

Apparently the court was moved to relate back the denial of class action because of a belief that appellants had failed to show justifiable reliance on Utah's suit in their behalf. The court based its conclusions in this respect on the fact that the members of the class, having knowledge of their claims and ample notice of proceedings in the West Coast Pipe Cases, could well have acted in their own behalf and need not have looked to Utah as their representative.

This, in our judgment, was not a proper standard for a determination of lack of reliance.[9] The question, rather, was whether the applicants for intervention had forborne to sue in their own behalf because of a justifiable belief that they were before the court in Utah's suit. To apply the court's standard seems unreasonably to discourage reliance on class actions.

Where a member of the class is dissatisfied with the repesentation it affords him, he can be expected to intervene in his own behalf. However, if satisified with the representation the suit affords, we perceive no sound reason at all for discouraging him from relying on it pending determination as to maintenance. Interests of judicial administration and the conservation of judicial time would seem to dictate that he should be encouraged not to complicate or enlarge the litigation unnecessarily by insisting that his own claim be given individual attention throughout the entire proceedings and not to

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[9]We assume, without deciding, that reliance is a relevant consideration and that relation back of a denial of class action because of lack of reliance is a course open to the court.

burden the courts unnecessarily by filing a parallel action.[10]

In this case the record persuasively indicates forebearance of suit as to all appellants. Some of them had actual knowledge that Utah was suing in their behalf. As to the others, Utah felt morally responsible to protect their interests and presented evidence that with foreknowledge of the court's views it would promptly have advised suit just as it ultimately advised that intervention be sought. Considering the promptness with which action was taken at that time, the record indicates that had denial of class action been ordered immediately after commencement of the suit, motions to intervene by all appellants would have been timely filed eight days later and three days prior to the running of the statute.

We conclude that it was error to relate the denial of class action back to commencement of suit. Accordingly, it was error to rule on motion for intervention that intervention was barred by §5(b).

The order of the District Court is affirmed as to intervention under Rule 23(a). As to intervention under Rule 23(b), the matter is remanded with instructions that the order be vacated and for further proceedings upon the motions. Costs are awarded to appellants.

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[10]The District Court itself has taken note of these considerations. In denying intervention it held that the resulting complications would prejudice the defendants.

> "[To] permit even a limited intervention on the part of petitioners for the purpose of conducting joint discovery proceedings would in the context of this case, seriously prejudice the rights of the defendants, and necessarily complicate and delay resolution of discovery problems arising in Utah's case." 50 F.R.D. at 102.

KILKENNY, Dissenting:

I believe the trial judge exercised a legal discretion and that the appellants, on the record before us, have not shown an abuse of his appraisal of the issues presented on the applications for intervention. I would affirm on the basis of the trial judge's decision. *State of Utah v. American Pipe & Construction Co.*, 50 F.R.D. 99 (C.D. Cal. 1970).

APPENDIX "F".

1. United States Code, Title 15, Section 15 (Clayton Act of October 15, 1914, c. 323, § 4, 38 Stat. 731):

"Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

2. United States Code, Title 15, Section 15a (Clayton Act of October 15, 1914, c. 323, § 4A, as added July 7, 1955, c. 283, § 1, 69 Stat. 282):

"Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefore in the United States district court for the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover actual damages by it sustained and the cost of suit."

3. United States Code, Title 15, Section 15b (Clayton Act of October 15, 1914, c. 323, § 4B, as added July 7, 1955, c. 283, § 1, 69 Stat. 283):

"Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued. No cause of action barred under existing law on the effective date of this section and sections 15a and 16 of this title shall be revived by said sections."

4. United States Code, Title 15, Section 16(b) (Clayton Act of October 15, 1914, c. 323, § 5(b), 38 Stat. 731, as amended July 7, 1955, c. 283, § 2(b), 69 Stat. 283):

"Whenever any civil or criminal proceeding is instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, but not including an action under section 15a of this title, the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter: *Provided, however,* That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

5. Rule 3, Federal Rules of Civil Procedure:

"COMMENCEMENT OF ACTION

A civil action is commenced by filing a complaint with the court."

6. Rule 23 (a), (b), and (c), Federal Rules of Civil Procedure:

"CLASS ACTIONS

(a) **Prerequisites to a Class Action.** One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all mem-

bers is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) **Class Actions Maintainable.** An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient

adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) **Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.**

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b) (3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b) (1) or (b) (2), whether or not favorable to the class, shall

include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b) (3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c) (2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly."

7. Rule 24(b), Federal Rules of Civil Procedure:

"(b) **Permissive Intervention.** Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

APPENDIX "G."

Statutory Limitation Periods Which Apply to Various Private Rights of Action Arising Out of or Provided for in Federal Regulatory Statutes.

1. 45 U.S.C. §153(r)

Establishes two year limitation period for suits challenging the awards made by the National Railroad Adjustment Board in disputes between employees and carriers.

2. 15 U.S.C. §1640(e)

One year statute for civil action brought pursuant to Truth in Lending Act.

3. 29 U.S.C. §630(d) (Age discrimination in employment)

One hundred eighty day period in which person aggrieved must file notification of intent to file action with Secretary of Labor in order to preserve right (in case Secretary fails to take action) to seek relief in civil action brought in court of competent jurisdiction. [Alternative three hundred day period established if state anti-discrimination procedures to be invoked pursuant to §633(b)].

4. 7 U.S.C. §2305(c)

Applies to actions based on injuries due to unfair trade practices in production of agricultural products. Limited to two years after the cause of action accrued.

5. 15 U.S.C. §1223

Action by automobile franchisee against manufacturer for failure to carry out terms of agreement in good faith. Three year limitations period.

6. 49 U.S.C. §3(3)

Action by carrier against shipper-consignee or against party to whom delivery is made pursuant to directions of shipper-consignee for carrier's charges to be brought within two years of accrual of cause of action or within six months of final judgment against the carrier in an action against either of such parties begun within two year limitation period.

7. 49 U.S.C. §16(3)(a) and (b)

Actions by or against carriers subject to Interstate Commerce Act for charges to be brought within two years of accrual of cause of action. Accrual begins on delivery or tender of delivery [Various extensions provided if particular steps taken by either party—§16(3)-(c) and (d)].

8. 49 U.S.C. §3(2)

Action against reconsignor or diverter for giving erroneous information as to beneficial owner to carrier or action against consignor or shipper if information given by reconsignor is correct is subject to same limitation periods as are described in 49 U.S.C. §3(3).

9. 49 U.S.C. §908

This section is a part of the chapter of the Interstate Commerce Act dealing with water carriers. It establishes a system of limitation periods applicable to various private claims which may be brought against carriers who violate the provisions of the chapter.

10. 49 U.S.C. §918

Establishes limitation periods for collection of rates and charges by carriers subject to the water carrier provisions of the Interstate Commerce Act.

11. 49 U.S.C. §1006(a).

Establishes system of limitation periods with respect to recovery of charges, overcharges and reparations from or by freight forwarders under the provisions of the Interstate Commerce Act relating to the rights and obligations of freight forwarders.

12. 49 U.S.C. §304(a)

Establishes limitation periods with respect to actions involving motor carriers arising pursuant to the chapter on Motor Carriers of the Interstate Commerce Act.

13. 15 U.S.C. §1681(p)

Establishes limitation period for actions brought by consumers against consumer credit reporting agencies who fail to comply with requirements of Consumer Credit Protection Act.

14. 46 U.S.C. §763

Establishes limitation period for suits brought under the chapter of the Shipping Statutes dealing with Death on the High Seas by Wrongful Act.

15. 43 U.S.C. §699

Establishes limitation period for suits brought by purchaser of land from person who originally purchased such land at public auction where agreement of sale to second purchaser violated §696 of the Title.

16. 45 U.S.C. §56

Establishes limitation period for actions brought against common carriers (railroads) by their employees pursuant to the statutory provisions providing therefor of the Federal Employer's Liability Act.

17. 42 U.S.C. §4053

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18. 15 U.S.C. §1711

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19. 29 U.S.C. §255

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20. 35 U.S.C. §286

Establishes general limitation periods for actions for damages resulting from patent infringements.

21. 12 U.S.C. §86

Establishes limitation period in which action to recover usurious interest charged by national bank must be brought.

22. 15 U.S.C. §1400(b)

Establishes limitation period in which distributor or dealer may commence action against manufacturer or distributor to recover damages sustained as a result of failure of said manufacturer or distributor to comply with repurchase requirements of Traffic and Motor Vehicle Safety Act.

23. 47 U.S.C. §415

Establishes limitation period for claims for charges or refund of overcharges brought by or against carriers

engaged in interstate communications activities subject to the regulation of the F.C.C.

24. 7 U.S.C. §499(g)

Establishes limitation period in which action must be commenced against agricultural dealer or broker who fails to pay reparation award ordered by Secretary of Agriculture under Perishable Agricultural Commodities Act.

25. 46 U.S.C. §730

Establishes limitation period in which action must be commenced to recover remuneration for rendering assistance or salvage service to a vessel within jurisdiction of the United States.

26. 12 U.S.C. §1977

Establishes limitation period for commencement of actions against banks (and related organizations) which may be brought pursuant to Chapter 22, "Tying Arrangements" of Title 12 (*Banks and Banking*).

Supreme Court, U. S.
FILED
APR 2 1973
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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1195

AMERICAN PIPE AND CONSTRUCTION CO., SMITH-SCOTT, INC., UNITED CONCRETE PIPE COMPANY, KAISER STEEL CORPORATION, UNITED STATES STEEL CORPORATION, U. S. INDUSTRIES, INC., UTAH CONCRETE PIPE COMPANY, W. R. WHITE COMPANY, all corporations, *Petitioners,*

vs.

STATE OF UTAH, a body politic, *et. al.,* *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

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October Term, 1972

No. 72-1195

AMERICAN PIPE AND CONSTRUCTION CO., SMITH-SCOTT, INC., UNITED CONCRETE PIPE COMPANY, KAISER STEEL CORPORATION, UNITED STATES STEEL CORPORATION, U. S. INDUSTRIES, INC., UTAH CONCRETE PIPE COMPANY, W. R. WHITE COMPANY, all corporations, *Petitioners,*

vs.

STATE OF UTAH, a body politic, *et. al.,* *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is not yet officially reported, but is appended to the Petition for a Writ of Certiorari as Appendix D at pages 33 through 39. This opinion replaced an opinion announced December 11, 1972, which is appended to the Petition as Appendix E at pages 40 through 48. The opinion of the trial court denying class action status to the instant action is reported at 49 F.R.D. 17 (C.D. Cal. 1969); and its opinion denying respondents' motions to intervene is reported at 50 F.R.D. 99 (C.D. Cal. 1970). These opinions are appended to the Petition for Certiorari as Appendixes B and C, respectively.

JURISDICTION

Respondents do not question the jurisdiction set forth in the Petition.

QUESTION PRESENTED

Whether the Court of Appeals correctly decided that respondents, who are members of an abortive class, are entitled to the benefit of the date of the commencement of a Sherman 1 class action for purpose of the statute of limitations.

STATUTES REGULATIONS AND RULES INVOLVED

The petition sets forth all pertinent statutes, rules and regulations.

STATEMENT OF THE CASE

On May 13, 1969, the State of Utah filed a complaint in the United States District Court for the District of Utah.[1] The complaint alleges violation of § 1 of the Sherman Antitrust Act[2] and seeks treble damages and injunctive relief arising out of the purchase of concrete and steel pipe. The State of Utah brought the action on behalf of itself and all of its lesser governmental entities that were end users of pipe acquired from the defendants, co-conspirators, and others.[3]

To give perspective to the issues presented in this petition, it is necessary to recount briefly the federal government's proceed-

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[1] R. 317-40 (Ex. G).

[2] 15 U.S.C. §1.

[3] The class alleged in the complaint was also broad enough to include all other states in the "Western Area" as therein defined, which had not previously filed a similar action, including Wyoming, Nevada and Idaho, and including their lesser governmental entities (R. 317, 318, 320-21).

ings involving concrete and steel pipe in the Western area. On March 10, 1964, a United States Grand Jury in the Southern District of California returned five indictments, each of which named certain individual defendants and two or more of the corporate defendants involved in the instant case, with the exception of Utah Concrete Pipe Company and W. R. White Company.[4] Each of the indictments charged the defendants named therein with combining and conspiring together in restraint of interstate trade in a specific product line of steel or concrete pipe in violation of § 1 of the Sherman Act, in that they submitted collusive and rigged bids for the sale of pipe and allocated and divided business among themselves. Pleas of *nolo contendere* were accepted by the court on June 19, 1964.[5] Subsequently, the United States filed five civil actions against various of the same corporate defendants. The civil complaints were based on facts uncovered by the Government in preparing its criminal indictments.[6] On October 28, 1964, the Government, seeking to restrain the defendants from continuing violations of § 1 of the Sherman Act[7] amended each of its five complaints by adding a new count pursuant to § 4 of the Sherman Act.[8]

On December 8, 1967, each of the defendants, with the exception of American Pipe and Construction Company, entered into consent decrees in each of the government civil cases in which they were named as defendants.[9] On May 24, 1968, a consent judgment was entered against American Pipe and Construction Company in each of the three government cases in which it had been named as a defendant.[10]

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[4] R. 8-46 (Ex. A).
[5] R. 48-68 (Ex. B).
[6] R. 70-134 (Ex. C).
[7] R. 136-228 (Ex. D).
[8] 15 U.S.C. §4.
[9] R. 230-84 (Ex. E).
[10] R. 286-315 (Ex. F).

The instant class action, alleging respondents to be members of the class, was commenced on May 13, 1969 — eleven days before the suspension period provided by § 5(b) of the Clayton Act[11] would have expired.[12] On August 28, 1969, pursuant to a motion of a majority of the defendants, the Judicial Panel on Multidistrict Litigation transferred the Utah case to the Central District of California for assignment to Judge Martin Pence, Chief Judge of the District of Hawaii, for coordinated or consolidated pretrial proceedings, pursuant to 28 U.S.C. § 1407.[13]

On November 14, 1969, the court granted defendants' motion for an order determining that the action should not be maintained as a class action,[14] stating:

> "In any event, the court can but conclude that the number of public entities in Utah, Wyoming, Nevada and Idaho who might have been injured by the alleged conspiracy could not possibly exceed the 350 cases heretofore filed by end users in the other states of the 'Western Area.' From prior actual experience in like cases involving the same alleged conspiracy, this court could not find that number so numerous that joinder of all members was impracticable, nor can it conclude that a class action here would achieve economies of time, effort and expenses or promote any more uniformity of decision that the joinder method heretofore proved successful. To the contrary, the fact of *joinder and intervention has made the determination of actual parties plaintiffs and defendants, as well as the percentage of damage determination, much simpler, easier and more practicable than would have been any class action procedure under the present Rule* 23(b)(3)." (Emphasis added.)[15]

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[11] 15 U.S.C. § 16(b).

[12] See Maricopa County v. American Pipe & Constr. Co., 303 F. Supp. 77 (D. Ariz. 1969), *aff'd per curiam*, 431 F.2d 1145 (9th Cir. 1970).

[13] *In re* West of the Rockies Concrete Pipe Antitrust Cases, 303 F. Supp. 507, 508 (J.P.M.L. 1969).

[14] R. 342-44 (Ex. H).

[15] R. 355; Utah v. American Pipe & Const. Co., 49 F.R.D. 17, 21. (C. D. Calif. 1969).

On December 4, 1969, the court entered its order that the class action could not be maintained.[16] Eight days later, on December 12, 1969, more than 60 lesser governmental entities of the State of Utah, including respondents, members of the abortive class, filed motions to intervene as plaintiffs.[17] Respondents had purchased substantial amounts of pipe from the defendants, co-conspirators and others.[18] While several of the respondents were aware of the class action before it was filed,[19] the majority could not be said to have knowingly relied upon the State's action. The State of Utah, however, did rely upon the class action as a vehicle through which the claims of all its lesser governmental entities could be presented to the court; and, upon the negative determination of the class, the State took steps to notify these entities which resulted in the motions to intervene.[20]

Following a hearing, the court on March 30, 1970, rendered its opinion on the applications to intervene.[21] In its opinion the court indicated that "the problem underlying all of the motions is that of the bar of the statute of limitations to the petitioners' complaints."[22] The court then stated that Rule 23 of the Federal Rules of Civil Procedure could not toll the antitrust statutes of limitation by any theory of relation back. Reasoning that §§ 4B[23]

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[16] R. 346-47 (Ex. I).

[17] R. 359-66. A supplemental motion to intervene was filed on December 29, 1969, for six additional applicants for intervention, R. 364.

[18] R. 389-438.

[19] R. 428-37.

[20] R. 528, 529, 538-40. One may presume that "class members situated in a given state would prefer to be represented by the attorney general for that jurisdiction." Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 494 (N.D. Ill. 1969).

[21] R. 447-65 (Ex. N); Utah v. American Pipe & Construction Co., 50 F.R.D. 99 (C.D. Calif. 1970).

[22] R. 449; 50 F.R.D. at 101.

[23] 15 U.S.C. § 15b.

and 5(b)[24] of the Clayton Act were substantive in nature, the court concluded:

> ". . . that within the statutorily created antitrust universe § 5(b) cannot be re-tolled by any Rule to permit relation back of their several causes of action by intervenors attempting to intervene in either class or non-class actions filed for violation of the antitrust laws, after the tolling period of § 5(b) has ended."[25]

The court denied leave to intervene with relation back for the purposes of the statute of limitations.[26] The court nevertheless held that the appellants' motions to intervene would be granted in the exercise of its discretion, as to the claims alleged for the four years preceding December 12, 1969, i..e, the period not then barred by § 4B of the Clayton Act.[27]

To secure an appealable final order, respondents amended paragraph 24 of their proposed complaint in intervention so as to limit their allegations of conspiracy to a date four years preceding the time of filing.[28] On July 8, 1970, the court entered its findings of fact, conclusions of law and order on the motions to intervene.[29] The court found that the tolling of the statute of limitations, based upon the government proceedings, ceased on May 24, 1969, and that the filing of a class action by the State of Utah, did not bring the intervenors within the period of limitation. Insofar as any of the proposed causes of action by respondents were based upon the government actions, the court held the same were barred by the applicable statute of limitations. The motions to intervene were then denied.

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[24] 15 U.S.C. § 16(b).
[25] R. 461; 50 F.R.D. at 108.
[26] R. 462; 50 F.R.D. at 108.
[27] R. 464-65; 50 F.R.D. at 110.
[28] R. 440-41 (Ex. L).
[29] R. 443-45 (Ex. M).

Respondents appealed the trial court's rejection of their motions to intervene to the United States Court of Appeals for the Ninth Circuit. In an opinion entered December 11, 1972, the Court of Appeals reversed the District Court.[30] A petition for rehearing was denied[31] but the earlier opinion was withdrawn and a new opinion entered on January 31, 1973.[32] The Court of Appeals noted that the denial of the class was based on trial court's conclusion that the suit could best be handled through joinder of the claimants and that the class was not denied for failure to state a claim on behalf of its alleged members nor for lack of standing or for reasons of bad faith or frivolity. The Court of Appeals held that in such circumstances "as to members of the class Utah purported to represent and whose claims it tendered to the court, suit was actually commenced by Utah's filing. The claims of appellants were then before the court and the only question was as to the manner in which they would be entertained on the merits. The requirements of § 5(b) were then met."[33]

The matter was ordered remanded to the District Court with instructions that the order be vacated and for further proceedings and motions.[34]

ARGUMENT

The decision of the United States Court of Appeals for the Ninth Circuit is not a proper case for review by this Court. It is a case of first instance, presenting no conflict with the decisions of other circuits. It is carefully restricted to the peculiar

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[30] State of Utah v. American Pipe & Const. Co., Civil Nos. 26,542 & 26,543 (filed Dec. 11, 1972) (this and the substituted opinion of Jan. 31, 1973 are hereinafter cited to the Petition for Writ of Certiorari ("Pet.")).

[31] Pet., App. A.

[32] Pet., App. D.

[33] Pet., App. D at 37-38.

[34] Pet., App. D at 39.

procedural history of Utah's class action and the subsequent applications for intervention. Despite petitioner's arguments to the contrary, it is supported by sound legal rationale and sound considerations of policy.

I. THE DECISION OF THE COURT OF APPEALS PRESENTS NO CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS.

The Court of Appeals was not faced with an abuse of discretion question. From its opinion it is clear that the lower court was prepared to allow the appellants to intervene so as to allege claims which in its mind were not barred by the statute of limitations; that is, those claims still within the four years provided by § 4B of the Clayton Act:[35]

> As the pleadings now stand, since petitioners have alleged a cause of action for the four years preceding December 12, 1969, when these motions were filed, this court could not now dismiss their complaints. In futuro, it can only rule on problems, discovery, etc., for periods after, as distinguished from prior to December 12, 1964, in the context of the statutory bar for any transactions or claims arising prior thereto. Therefore, as to all parties-plaintiff now before the court, the court's rulings do not with finality dispose of their cases.[36]

It is clear that the trial court did not deny intervention as an exercise of its discretion. Rather, intervention was denied because of the court's holding as to the statute of limitations. The Court of Appeals had no other question before it. The problems of abuse of discretion and possible conflicts arising therefrom are illusory.[37]

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[35] 15 U.S.C. § 15b.

[36] 50 F.R.D. at 110.

[37] The posture of the case before the Court of Appeals was similar to that of Brotherhood of Locomotive Firemen & Enginemen v. United States, ex rel. Deavers, 183 F.2d 65 (5th Cir. 1950), where the trial court had refused in-

Before the Ninth Circuit's decision no court had squarely decided, in reference to amended Rule 23, whether the Clayton Act statute of limitations is tolled for purported members of a class when the action is filed before but denied after the date that the limitations run.[38] The question has been considered or alluded to in dicta by some district courts,[39] but none of these statements is authoritative because the courts were deciding the propriety of the class action, not the effect of the class action on the statute of limitations. The most authoritative statement concerning this question, made by the Tenth Circuit in *Esplin v. Hirschi*,[40] is in complete harmony with the Ninth Circuit's decision, although it too must be characterized as dictum.

> In holding that the class action should have been allowed, it becomes necessary to comment briefly on the effect of this upon the statute of limitations issue. This court has held that the commencement of a spurious class action halts the running of the statute as against all members of the class. *Union Carbide and Carbon Corp. v. Nisley*, 300 F.2d 561, 590 (10th Cir. 1962). The same will be true under newly amended Rule 23. Hence, the rights

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tervention on the basis of a remark of the appellate court, in a previous appeal, that no othre parties were necessary to adjudicate the issue. United States ex rel. Deavers v. Missouri, K. & T. R. Co., 171 F.2d 961 (5th Cir.). The Fifth Circuit, noting that the trial court was disposed to allow intervention but for its remark, stated that no question of discretion was involved. 183 F.2d at 67.

[38] The majority rule before the 1966 amendments to Rule 23 was that even in "spurious" class actions, a plaintiff could intervene after a timely filing of the action without reference to the statute of limitations. E.g., DePinto v. Provident Security Life Ins. Co., 323 F.2d 826 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1954); Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 589-90 (10th Cir. 1961), *cert. dismissed*, 371 U.S. 801 (1962). York v. Guaranty Trust Co., 143 F.2d 503, 529 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945).

[39] Abercrombie v. Lum's, Inc., 345 F.Supp. 387, 394 (S.D. Fla. 1972); Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412, 414 (S.D. N.Y. 1972); Buford v. American Finance Co., 333 F. Supp. 1243, 1252 (N.D. Ga. 1971); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., 43 F.R.D. 452, 460-61 (E.D. Pa. 1968); Minnesota v. United States Steel Corp., 44 F.R.D. 559 (D. Minn. 1968).

[40] 402 F.2d 94 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969).

> of all class members are to be determined as if the class action had been allowed instead of being incorrectly terminated below. This means that the status of class members is to be determined by relation back to the date of the initiation of this suit in December, 1965.[41]

Even if the "distillate" of the dicta petitioner has collected did establish that members of an abortive class must rely upon the class action before the statute of limitations is tolled for them, there would be no conflict with the present decision. The Ninth Circuit has not precluded the possibility that reliance may be a relevant factor in certain appropriate cases, but has decided that reliance is not relevant in an action where the applicants for intervention were denied class status because, in the interests of efficient judicial administration of the case, the court preferred to have their claims presented by intervention and joinder.[42] When the class action is denied for other reasons — such as a failure of questions of law and fact common to the class or the inappropriateness of the representative parties[43] — reliance might be a sound basis for determining whether the statute of limita-

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[41] 402 F.2d at 101, n. 14.

[42] The difference from the instant case in the size and nature of the class and its relationship to the representative parties, as well as the procedural status of the action, should be noted in the decisions petitioner cites to show the importance of reliance: Rogers v. Coburn Finance Corp. of DeKalb, 54 F.R.D. 417 (N.D. Ga. 1972) (motion to reinstate class action denied in proceedings under Truth in Lending Act, 15 U.S.C. §1601); Ratner v. Chemical Bank New York Trust Co., *supra note* 39, (130,000 potential members of class, plaintiff only member fore the court, class action denied); Abercrombie v. Lum's, Inc. *supra* note 39, (class action denied, common issues did not predominate, plaintiff an insufficient representative); Buford v. American Finance Co., *supra* note 39, (class action under Truth in Lending Act denied); Philadelphia Elec. Co. v. Anaconda Am. Brass Co., *supra* note 39, (class actions maintained as to certain purported classes and maintained with membership limited as to others).

[43] A failure to meet the requirements of Rule 23(a) (2), (3) or (4), F.R. Civ. Pro., obviously implies a much different relationship between the representative parties and the purported class than does a failure to meet the requirements of Rule 23(a) (1).

tions was tolled."[44] Nothing in the Court of Appeal's decision would prevent such developments in the law of the Ninth Circuit, nor contradict similar developments in other circuits.

The decision of the Court of Appeals is, by its own terms, closely restricted to the peculiar facts of this case:

> Maintenance of the class action was denied not for failure of the complaint to state a claim on behalf of the members of the class (the court recognized the probability of common issues of law and fact respecting the underlying conspiracy); not for lack of standing of the representative, or for reasons of bad faith or frivolity. It was denied because, considering the size of the class and the nature of the claims of its members, it was felt that those claims could more efficiently be entertained through joinder of the claimants rather than by class treatment.
>
> Under these circumstances, we hold that as to members of the class Utah purported to represent, and whose claims it tendered to the court, suit was actually commenced by Utah's filing. The claims of appellants were then before the court and the only question was as to the manner in which they should be entertained on the merits. The requirements of § 5(b) were then met.[45]

As the Court of Appeals points out, it cannot be seriously disputed that respondents, lesser governmental entities of the State of Utah, would have been proper members of the class,[46] had the District Court wished to entertain a class action, nor that Utah, through its Attorney General, would have been a proper party to represent their interests. Because the opinion is based on the nature of the class and the lower court's reasons for denying class

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[44] "[I]t may well be that . . . *at the very least* an opportunity should be presented for proof of reliance upon the pendancy of the purported class action sufficient to toll the statute of limitations." Philadelphia Elec. Co. v. Anaconda Am. Brass Co., *supra* note 34, at 461 (Emphasis added).

[45] Pet., App. D at 37-38.

[46] The trial court had previously agreed, 49 F.R.D. at 20.

action status to the suit, it is not a precedent that will encompass all cases involving applicants for intervention who, as members of a failed class, wish to have the statute of limitations tolled. Cases involving applicants from classes that failed for reasons other than the efficient administration of the case remain to be decided.

II. THE DECISION OF THE COURT OF APPEALS IS CLEARLY CORRECT.

Petitioners argue that the Ninth Circuit's decision will "make the time period of every statute of limitation open-ended with no discernible period of repose."[47] In fact, as petitioners themselves make clear, the only indefinite period in such cases will be the time required by the trial court to determine whether the suit will be maintained as a class action. If the class fails, its members will have the same interval to file new actions or motions to intervene as remained between the date the class action was brought and the date the statute would have run. This is a discernible period.

Petitioners argue too that the decision will encourage the solicitation of claims by plaintiffs during the time the propriety of the class action is being decided.[48] In many class actions the solicitation of claimants is an abuse that the trial court must control. There is no reason, however, why the methods of control available to the trial court could not be employed during the period it is considering whether the class action should be maintained. The order prohibiting both parties from contacting members of the purported class,[49] which petitioners cite as evidence of the problem, would still be available.

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[47] Pet. at 17.

[48] Id. at 24.

[49] Manual for Complex and Multidistrict Litigation, §§ 1.61-1.62.

Contrary to petitioners' assertions, the instant case is not an example of such abuse. The Attorney General of the State of Utah is its chief legal officer with responsibilities running to the state's inferior governmental entities.[50] He would be remiss in his duties if he failed to apprise these entities of their just claims.

There is no danger that the instant decision will "exacerbate the problem of over use and abuse of the class action device" or "encourage the filing of invalid as well as valid class actions."[51] It bears repeating in reply to these arguments that the decision is limited to cases denying the class action on the sole basis that the claims can be handled more efficiently through joinder and intervention. As the Circuit Court points out, the number of claimants in a purported class will rarely be so small that as matter of law Rule 23(a)(1) does not apply.[52] If the other requirements of Rule 23(a) are met, i.e., if the applicants for intervention would have been proper members of the class had the trial court exercised its discretion to sustain it — then the problem of abuse and over use of the class action device is difficult to discern. Petitioners could not be asserting that a suit might be an abuse if it were brought on behalf of claimants with questions of law and fact common to them who were represented by parties with typical claims who would fairly and adequately protect their interests. Such a class might be so small that its claim to class action status could be dismissed as frivolous. But such possibilities pose no real danger to the class action device.

The chimerical problems of repose, solicitation, and abuse that petitioners see in the Court of Appeals' decision should be contrasted with the real problems that would arise from the Dis-

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[50] *See*, Utah Const. art. VII, §18; Utah Code Ann. § 67-5-1 (1953 Replacement).
[51] Pet. at 25.
[52] Pet., App. D at 38, n. 9.

trict Court's rule that claimants in respondents' position are barred. To affirm this result would make Rule 23 virtually inapplicable and useless in antitrust cases. No member of a purported class could safely refrain from filing a separate suit, for if he did refrain, he would incur the risk that defendants' inevitable challenge to the class status of the suit would prevail and that the order denying the class would be entered after the date ending the one year tolling provision of § 5(b). The rule would induce the filing of a large number of individual lawsuits and force the parties to pursue many concurrent suits. The policy of Rule 23, to conserve judicial time and dispose a large number of claims efficiently, would be subverted.[53]

The District Court's decision would put § 5(b) entirely within the discretion of the trial judge. If a class action is sustained, then, following the District Court's reasoning, each member of it, including an ignorant member "sleeping on his claim," would be before the court with his action commenced before the statute had run. If the class is denied, even on the grounds that its members' claims could more efficiently and practicably be litigated through intervention, then the members of it, including those who stand ready to present their claims as intervenors, were never before the court and their claims are barred. The Court of Appeals concluded that to allow this result "would be to empower the court, through the discretionary determination of whether the suit had been commenced or not, to render the statute of limitations applicable or not, as it sees fit. Considerations of order and certainty dictate that such questions should be resolved by rule of law rather than exercise of discretion."[54]

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[53] Esplin v. Hirschi, *supra* note 40; Dolgow v. Anderson, 43 F.R.D. 472 (E.D. N.Y. 1968).

[54] Pet., App. D at 38, n. 9.

This result also bears directly on the District Court's argument that it would be improper to toll the statute for the period the class action was being considered because such tolling would abridge petitioners' substantive right to have the claims against them limited by time. This abridgment, the court reasoned, would result from an application of the Rules of Civil Procedure that would violate 28 U.S.C. §2072,[55] which states that the Rules of Civil Procedure "shall not abridge, enlarge or modify any substantive rights . . ." However, if members of a valid class have their action commenced when the class action is filed, while members of a failed class are never before the court when the class is denied after the period of suspension has ended, then *either* determination under Rule 23 affects the "substantive" right of the parties. The time after which defendant is protected by the time bar depends directly on a determination made under the Rules of Civil Procedure. The trial court reached the same result concerning the substantive procedural-dichotomy that it sought to avoid by denying the applications for intervention. It is impossible to avoid such contradictions if the procedure-substance classification is made to bear the burdens that should properly be placed on considerations of policy and fairness. In this case the contradiction is compounded, for in arrogating the statute of limitations to its discretion, the trial court removed a "substantive" right from the certainty of both the statutes and the Rules, and left it to be abridged or enlarged in the discretion of the court.

The decision of the Court of Appeals is in accord with the majority of cases that considered the problem of the relationship between class actions and statutes of limitations (prior to

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[55] 50 F.R.D. at 103.

the amendment of Rule 23 in 1966.)[56] As the Court of Appeals notes, the principal objection to the rule that a plaintiff could intervene after timely filing a class action without independently satisfying the applicable statute of limitations was removed by the new Rule. Because all class members are now bound by the judgment unless they affirmatively elect to remove themselves from the class, they can no longer await the outcome of the action to decide whether or not to intervene.[57] This change in Rule 23 strengthens the force of the pre-1966 decisions.

Petitioners accuse the Court of Appeals of their own *non sequiter*. The court did not determine that "(i)nasmuch as class members who do not participate in the action are now bound by the judgment therein under the current Rule 23, they should be allowed to intervene without satisfying the statute of limitations when class action status is denied."[58] The decision does not so beg the question. The Court reasoned that because "a civil matter is commenced by filing a complaint with the court," members of a class in respondents' position had satisfied the statute when the class action was filed. If the class had succeeded, there could be no question that respondents were properly before the court within the statute of limitations. When it failed *only because the trial court in its discretion wanted the claims presented in a different form of proceeding*, it could not

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[56] Escott v. Barclis Construction Corp., 340 F.2d 371 (2nd Cir. 1965), *cert. denied* 382 U.S. 816 (1966); DePinto v. Provident Security Life Ins. Co., 232 F.2d 826 (9th Cir. 1963), *cert. denied*, 376 U.S. 950 (1964); Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 589-90 (10th Cir. 1961), *cert. dismissed*, 371 U.S. 801 (1962); York v. Guaranty Trust Co., 143 F.2d 503, 529 (2d Cir. 1944), *rev'd on other grounds*, 326 U.S. 99 (1945). *Contra*, Pennyslvania Co. for Insurances v. Deckert, 123 F.2d 979 (3d Cir. 1941).

[57] See Pet., App. D at 36, n. 7, for the Court of Appeals' discussion.

[58] Pet. at 25.

be said that respondents were then never before the court, but only that they were out of court and again in exactly the same position as when the class action was filed.

CONCLUSION

The decision of the United States Court of Appeals is clearly correct and based upon sound principles of law and policy. It presents no conflict with the decisions of this court or the decision of other circuits. The petition for a writ of certiorari should be denied.

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FILE COPY

FILE
JUN 20
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IN THE

Supreme Court of the United S[illegible]

October Term, 1972
No. 72-1195

AMERICAN PIPE AND CONSTRUCTION CO., SMITH-SCOTT CO., INC., UNITED CONCRETE PIPE COMPANY, KAISER STEEL CORPORATION, UNITED STATES STEEL CORPORATION, U.S. INDUSTRIES, INC., UTAH CONCRETE PIPE COMPANY, W. R. WHITE COMPANY, all corporations,

Petitioners,

vs.

STATE OF UTAH, a body politic, *et al.*,

Respondents.

BRIEF FOR PETITIONERS.

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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-1195

AMERICAN PIPE AND CONSTRUCTION CO., SMITH-SCOTT CO., INC., UNITED CONCRETE PIPE COMPANY, KAISER STEEL CORPORATION, UNITED STATES STEEL CORPORATION, U.S. INDUSTRIES, INC., UTAH CONCRETE PIPE COMPANY, W. R. WHITE COMPANY, all corporations,

Petitioners,

vs.

STATE OF UTAH, a body politic, *et al.*,

Respondents.

BRIEF FOR PETITIONERS.

Opinions Below.

The opinion of the District Court, dated December 17, 1969, denying class action status to the instant action, is reported at 49 F.R.D. 17 (C.D. Calif. 1969) (A. 346-55; R. 349-57). The opinion of the District Court dated March 30, 1970, denying the motions of Respondents to intervene, is reported at 50 F.R.D. 99 (C.D. Calif. 1970) (A. 482-502; R. 447-65). The opinion of the Court of Appeals for the Ninth Circuit is reported at 473 F.2d 580 (dated January 31, 1973) (Petition for a Writ of Certiorari, Appendix D, at 33-39).

Jurisdiction.

The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1). An opinion of the United States Court of Appeals for the Ninth Circuit in this case was first filed and entered December 11, 1972 (Petition for a Writ of Certiorari, Appendix E, at 40-48). Thereafter, a petition for rehearing was filed on December 22, 1972. On January 31, 1973, the opinion and judgment dated December 11, 1972, were withdrawn, the opinion and judgment dated January 31, 1973, were entered and the petition for rehearing was denied (Petition for a Writ of Certiorari, Appendix D at 33-39 and Appendix A at 1, respectively). The petition for *certiorari* was filed on March 2, 1973, within ninety (90) days of the aforesaid date of January 31, 1973. On May 7, 1973, this Court granted *certiorari* to review the judgment of the Court of Appeals.

Statutes, Federal Rules and Regulations Involved.

1. *United States Code,* Title 15, Section 15 (Clayton Act of October 15, 1914, c. 323, § 4, 38 Stat. 731);

2. *United States Code,* Title 15, Section 15a (Clayton Act of October 15, 1914, c. 323, § 4A, as added July 7, 1955, c. 283, § 1, 69 Stat. 282);

3. *United States Code,* Title 15, Section 15b (Clayton Act of October 15, 1914, c. 323, § 4B, as added July 7, 1955, c. 283, § 1, 69 Stat. 283);

4. United States Code, Title 15, Section 16b (Clayton Act of October 15, 1914, c. 323, § 5(b), 38 Stat. 731, as amended July 7, 1955, c. 283, § 2(b), 69 Stat. 283);

5. Rule 3, Federal Rules of Civil Procedure;

6. Rule 8, Federal Rules of Civil Procedure.

7. Rule 23(a), (b) and (c), Federal Rules of Civil Procedure; and

8. Rule 24(b), Federal Rules of Civil Procedure. (See A. 5-10).

Questions Presented for Review.

1. Whether, as held by the Ninth Circuit, the filing of an invalid class action abridges or modifies the substantive barring provisions of Section 5 of the Clayton Act.

2. Whether the decision of the Court of Appeals creates substantial problems in the administration of Rule 23 and deprives defendants of due process of law.

3. Whether the decision of the Ninth Circuit conflicts with the requirements of Rule 24(b), F.R.Civ. P.

Statement of the Case.

On May 13, 1969, the State of Utah filed a class action complaint against Petitioners [defendants below] in the United States District Court for the District of Utah, alleging a Sherman Act conspiracy in the sale of concrete and steel pipe and seeking treble damages for purchases of those products. The State of Utah purported to represent a class described as "those public bodies and agencies of state and local government in the State of Utah who are end users of pipe acquired from defendants, co-conspirators and others"[1] and "all other states in the Western Area, . . . which have not previously filed a similar action."[2] At the time Utah filed its class action complaint, however, only six or seven members of the purported class "had ever dis-

[1]A. 313; R. 317-18.

[2]A. 314; R. 318.

cussed with Utah's attorney the possibility of a pipe antitrust suit against * * * [Petitioners]."[3]

Utah's complaint alleged a price-fixing conspiracy among Petitioners continuing until the date of the filing of the complaint.[4] In fact, the present action is an extremely tardy tag-end appendage to and relies upon the same conspiracies alleged in the litigation commonly known as the "West Coast Pipe Cases" in which Respondents had every opportunity to join. Such cases were in litigation for more than 4 years and were widely publicized. By reason thereof, Respondents are charged with notice of their pendency. The tardy character of the motions to intervene is underscored by the history of this West Coast Pipe litigation. Such cases, more than 100 in number with approximately 350 claimants, included a group of class actions in which Respondents could have joined, and were pending between 1964 and 1968 in the various District Courts of the Ninth Circuit. The actions were consolidated for discovery under the Honorable Martin Pence, Chief Judge for the District of Hawaii. In such consolidated actions, Judge Pence entered an order that prospective interveners in the various class actions should file by March 31, 1966.[5]

The West Coast Pipe Cases grew out of five Government criminal actions initiated in March 1964 and terminated on June 19, 1964.[6] These actions were fol-

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[3]*State of Utah v. American Pipe and Construction Co., et al.*, 50 F.R.D. 99, 101 (C.D. Calif. 1970); A. 483; R. 448.

[4]A. 324; R. 327.

[5]A. 437; R. 492.

[6]Under the literal language thereof, the barring provisions of Section 5(b) of the Clayton Act should have been triggered by such termination of the Government criminal actions, since 5(b) provides:

"That *whenever* the running of the statute of limitations in

lowed by five Government civil actions filed under the False Claims Act[7] on June 23, 1964.[8] Thereafter, the Government civil actions were amended on October 28, 1964, to add a claim for injunctive relief under Section 4 of the Clayton Act.[9] The purpose of this amendment by the Government was to add a claim capable of tolling the statute of limitations (Section 5(b) of the Clayton Act)[10] as to private claims. On December 8, 1967, all defendants except American Pipe and Construction Company entered into consent decrees in the Government civil actions,[11] which in light of decisions from the Ninth Circuit and other jurisdictions would have caused the statute of limitations to run one year thereafter.[12] On May 24, 1968, the actions against American were also terminated.[13]

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respect of a cause of action arising under section 15 of this title is suspended hereunder, *any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued.*" (Emphasis added).

[7]31 U.S.C. §§ 231-33.

[8]A. 72-139; R. 70-134.

[9]15 U.S.C. § 15a; A. 140-231; R. 136-228.

[10]15 U.S.C. § 16(b).

[11]A. 232-83; R. 230-84.

[12]*See, Manny v. Warner Bros. Pictures,* 116 F.Supp. 807, 809-10 (S.D. Cal. 1953); *Century Hardware Corp. v. Powernail Co.,* 282 F.Supp. 223, 228-29 (E.D. Wis. 1968); *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.,* 193 F.Supp. 401, 403-05 (S.D. N.Y. 1961); *Grengs v. Twentieth Century Fox Film Corp.,* 232 F.2d 325, 333 (7th Cir. 1956), *cert. denied,* 352 U.S. 871 (1956); *Tague v. Balaban,* 146 F.Supp. 356, 361 (N.D. Ill. 1956); and *Sun Theatre Corp. v. RKO Radio Pictures,* 213 F.2d 284, 292 (7th Cir. 1954).

[13]American was not a party to two of the Government civil actions—those involving steel large and small diameter pressure pipe. Accordingly, those two actions were terminated for all purposes with respect to all defendants on December 8, 1967, and the statute of limitations with respect to claims relating to those types of pipe ran long before the State of Utah filed its

(This footnote is continued on next page)

Prior to the events which gave rise to the instant appeal Judge Pence held, in *Maricopa County v. American Pipe and Construction Co., et al.*, 303 F.Supp. 77 (D. Ariz. 1969) that the statute of limitations as to private claims arising out of the Western Pipe Conspiracy was tolled throughout both the Government criminal actions and the Government civil actions and remained tolled as to each co-conspirator until May 24, 1969, one year following the termination of the Government civil actions as to the last defendant, American. The effect of such decision was to abrogate the defendant by defendant rule which had previously been enunciated by a district court in the Ninth Circuit[14] in the only decision by any Court in the Ninth Circuit which had considered such question. The *Maricopa* decision also constituted a holding that successive noncontemporaneous government actions will suspend the extension of the statute of limitations beyond the one year period of Section 5(b) of the Clayton Act even though such statute explicitly refers to a "single government proceeding." By virtue of that decision, the statute of limitations as to private claims arising out of the Western Pipe conspiracy was greatly lengthened, and Utah was permitted to file its complaint on May 13, 1969, more than six years after the termination of the conspiracy complained of and only eleven days prior to the date

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complaint herein. This same point was argued to the United States Court of Appeals for the Ninth Circuit, in a parallel case, *Maricopa County v. American Pipe and Construction Co., et al.*, 303 F.Supp. 77 (D. Ariz. 1969). It refused to pass on the point, holding that it had not been raised below, but reserved to appellants therein the right to assert the point before the District Court [431 F.2d 1145 (9th Cir. 1970)] .In the instant case, the same point was argued to the District Court [R. 559-64]. It did not pass on the point because it decided on broader grounds the issues involved in this appeal.

[14] *Manny v. Warner Bros. Pictures, supra*, n. 12.

on which the enlarged period of limitations finally ran. During those eleven days, none of the members of the purported class alleged by Utah filed any actions or motions or in any way made their presence known to the District Court.

On August 28, 1969, the Judicial Panel on Multidistrict Litigation transferred the instant case from the District of Utah to the Central District of California for assignment to Judge Martin Pence, Chief Judge of the District of Hawaii, for consolidated pretrial proceedings pursuant to 28 U.S.C. Section 1407.[15] On December 4, 1969, Judge Pence, pursuant to Petitioners' motion dated November 14, 1969, entered an order that the instant case may "* * * not be maintained as a class action and, no parties having joined therein, the class action, * * * in all respects stands terminated as of May 13, 1969, the date of the filing of the complaint herein."[16] The order was based on a finding "that the first prerequisites to a class action have not and cannot here be met."[17] That order found that: "Numerous other parties, who would clearly qualify as members of the general class alleged by plaintiffs * * * [have] heretofore commenced actions on their own behalf. * * * The entities alleged by plaintiff to be members of the class described in the Complaint, in fact, are not so numerous that joinder of all such entities is impracticable," and "[a] class action has heretofore been shown to be inferior to other available methods for the fair and efficient adjudication of the instant controversy. * * *"[18] Such findings were made in the

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[15] *In re West of the Rockie Concrete Pipe Antitrust Cases*, 303 F.Supp. 507, 508 (J.P.M.L. 1969).

[16] A. 345; R. 347.

[17] A. 353; R. 356.

[18] A. 344-45; R. 346-47.

light of the series of class actions filed in the West Coast Pipe Cases in which various plaintiffs purported to represent all potential claimants, including the Respondents herein.

At the time of Judge Pence's decision respecting the class action, none of the members of the purported class had evidenced any interest in Utah's suit. Subsequent to that decision, on December 12, 1969, and subsequently on December 29, 1969, as a result of solicitation by Utah,[19] some seventy-odd towns, cities and other government entities [Respondents] moved to intervene as plaintiffs in this action pursuant to Rule 24(a)(2) or Rule 24(b)(2) of the Federal Rules of Civil Procedure.[20] Petitioners opposed such intervention, and, following a hearing, the District Court on March 30, 1970, denied the alternative motions. It specifically found that Respondents were not entitled to intervene as a matter of right pursuant to Rule 24(a)(2) because they had no legitimate interest in the outcome of Utah's action.[21] It refused to grant permissive intervention pursuant to Rule 24(b)(2) on two grounds: first, because "* * * to permit even a limited intervention on the part of petitioners for the purpose of conducting joint discovery proceedings would in the context of this case, seriously prejudice the rights of the defendants, and necessarily complicate and delay resolution of discovery problems arising in Utah's case"[22] and, second, because any attempt to avoid the bar of Section 5(b) of the Clayton Act by means of the Federal Rules of Civil Procedure, would unlawfully abridge substan-

[19]A. 482; R. 447. 50 F.R.D. at 100.
[20]A. 355-87; R. 359-88.
[21]A. 486; R. 451. 50 F.R.D. at 102.
[22]A. 486; R. 451. 50 F.R.D. at 102.

tive rights of antitrust defendants.[23] It did, however, indicate that neither ground would apply to the assertion of claims arising during the four-year period preceding the filing of the motions to intervene and that intervetion would be granted for the limited purpose of asserting such claims.[24]

In order to secure a final appealable order [and, no doubt, in heed of the District Court's advice that pursuit of post-1962 claims would be an expensive and fruitless venture], Respondents amended their proposed complaint in intervention so as to eliminate any claim as to the four-year period preceding December 12, 1969. Thereupon, Respondents took an appeal from the denial of their motions to intervene.

On December 11, 1972, the Ninth Circuit, by a divided court, reversed the decision of Judge Martin Pence denying intervention, basing such decision primarily upon the fact that "the record persuasively indicates forbearance [to sue in reliance upon the class

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[23]A. 497; R. 460. 50 F.R.D. at 108.

Previously, in its Findings of Fact respecting the class action, the Trial Court made the following findings:

> "1. Numerous other parties, who would clearly qualify as members of the general class alleged by plaintiffs, have heretofore commenced actions on their own behalf. Between August 1964 and April 1966, over 100 separate actions allegedly arising out of this same 'Western Pipe Conspiracy' were filed in eight different United States District Courts of the Ninth Circuit. In three actions members of an alleged class in those actions purported to represent the same broad class of 'public end-users' which plaintiffs herein claim to represent, and in another action, the State of California claimed to represent all of the public end-users within said State. *All the aforesaid actions and resulting settlements were widely publicized and potential plaintiffs, throughout the 'Western area,' should have had notice thereof prior to the termination, during 1967, 1968 and 1969, of said actions.* [A. 344; R. 346-47] (Emphasis added).

[24]A. 484, n. 2; R. 449, n. 2. 50 F.R.D. at 101, n. 2.

action] as to all appellants."[25] In a Petition for Rehearing, Petitioners pointed out that the Ninth Circuit had erroneously assumed the existence of reliance by would-be class members, an assumption wholly unsupported by the record. Thereafter, on January 31, 1973, the earlier opinion of the Ninth Circuit was withdrawn and, by a divided court, the Ninth Circuit again reversed the order of the District Court denying intervention by Respondents pursuant to Rule 24(a), F.R. Civ.P. This time, however, the Ninth Circuit's opinion eliminated the previous factual error by deleting therefrom any reference to the fact of reliance by would-be class members and eliminating any requirement that such reliance be shown by would-be class members in order to toll the statute of limitations.

The effect of the Ninth Circuit's decision is to repeal by judicial mandate the barring provisions of Section 5(b) of the Clayton Act and to contravene both the express prerequisites to the existence of a class action under Rule 23 and the requirements of Rule 24(b), F.R.Civ.P. In ruling that intervention should have been granted pursuant to Rule 24(b), the Ninth Circuit held that the filing of a class action, even an invalid one, tolls the running of Section 5(b) as to members of the "non-class." Although the decision of the Ninth Circuit upheld the District Court's denial of intervention as a matter of right pursuant to Rule 24(a), the practical effect of the Ninth Circuit's decision is to render intervention under Rule 24(b) mandatory rather than discretionary. The crux of such decision is that whenever a class action is filed, anyone who is purportedly a member of that class must be permitted to

[25]Petition for a Writ of Certiorari, Appendix E, at 47.

intervene even though no class is found to exist under Rule 23 and the alleged class members would otherwise be barred by the statute of limitations from filing suit.

Moreover, the Ninth Circuit, in announcing its new rule of mandatory intervention pursuant to Rule 24(b), chose to ignore altogether the discretionary portion of the District Court's ruling wherein it denied permissive intervention for a variety of reasons: the untimeliness of the petition to intervene; the serious prejudice to the rights of Petitioners if intervention were allowed; and the complication and delay of discovery that would result by allowing intervention.

The decision below is at odds with the principles established by this Court, and establishes an erroneous standard for the district courts of the Ninth Circuit to follow in application of the Federal Rules of Civil Procedure.

Summary of Argument.

Despite the unchallenged decision of the District Court that there never was a class action, the Ninth Circuit, absent logical rationale or judicial precedent, held that a non-existent class action tolled the statute of limitations for purported class members. The decision converts non-claimants and non-class members (there was no Rule 23 class) into parties before the court on the date of the Utah complaint based solely on the fact that the Utah complaint contained class action allegations. This exalts form over substance. The District Court correctly held there was no class and since "there never was a class," there could not be a claim of vicarious filing by the purported class members.[28] By con-

[28]A. 499; R. 462. 50 F.R.D. at 108.

trast, the Ninth Circuit rejected the elementary concept that "[a] class action does not exist merely because it is so designated by the pleadings,"[27] and it ignored the criteria of Rule 23 which establishes prerequisites which must be met to establish a class action. Conceptually, this makes no sense. If an individual were to file an antitrust claim on his own behalf, no other persons with similar or common claims could relate a later filed complaint back to the first action to toll the statute of limitations where there never was a class. Merely adding the magic words alleging a class should not work to abrogate a statute of limitations enacted by the Congress.

By holding that purported class members are before the Court despite the failure to meet the prerequisites of Rule 23, the Ninth Circuit's opinion herein contravenes the provisions of Rule 23 established by the Supreme Court and abrogates the substantive barring provisions of Section 5(b) of the Clayton Act enacted by Congress. It is only in cases where the District Court determines that the action may be maintained as a class action that class members may be held to be before the Court provided that such members comply with Section 5(b) of the Clayton Act and with the requirements of due process as exemplified by Rule 8, F.R.Civ.P. Such prerequisites are not met by Respondents. It is clearly impermissible for the Ninth Circuit to amend rules of procedure promulgated by the Supreme Court; it is equally impermissible for any court to abridge any substantive statute of Congress by means of rules of procedure. The Enabling Act which authorizes the Su-

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[27] *Rossin v. Southern Union Gas Company*, 472 F.2d 707, 712 (10th Cir. Opinion of January 17, 1973). *Accord: Cash v. Swifton Land Corporation*, 434 F.2d 569, 571 (6th Cir. 1970).

preme Court to promulgate the Federal Rules (28 U.S.C. 2072) expressly prohibited the Court from promulgating rules which "abridge, enlarge or modify any substantive right."

There is no sound basis for finding any relation back concept whereby interveners can relate their petitions back to the date of filing of the State of Utah complaint. As held by the District Court:

> "The above conclusion carries even more thrust here, where this court has determined that the action may not be maintained as a class action. The class action, in the words of the Committee, has been 'stripped of its character as a class action.' Since there never was a class, the members of the 'class' cannot claim that they started their suits, vicariously, before the tolling period expired. There being no class, there is no connecting link available, even for the 'relying seven', for attachment of any 'relation back' hook."[28]

Since there never was a "class" the Ninth Circuit's decision cannot be supported on the basis of any vicarious filing rationale as recognized in some cases involving valid class actions. No class members could be solicited or conscripted with or without their consent since no class action existed. It therefore remains incomprehensible how there could be vicarious filing or relation back or presence before the Court of purported class members at the time of the Utah filing.

The Court of Appeals' decision raises serious constitutional questions as to the proper powers of the courts in adversely affecting substantive rights under the guise of

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[28]A. 498-99; R. 462-63. 50 F.R.D. at 108.

implementing procedural rules. The Federal Rules cannot be converted into statutory amendment of the statute of limitations which is the practical effect of the Ninth Circuit decision. That Court's opinion in abridging Petitioners' rights by not requiring the timely filing of a pleading that conforms to the requirements of Rule 8, F.R.Civ.P., deprives the Petitioners of due process of law. In the interest of proper administration of justice by the federal judiciary, the Supreme Court should establish a clear precedent which requires that all persons seeking to present claims before the federal courts individually satisfy the substantive requirements of any applicable statutes of limitation in class and non-class actions alike.

The decision of the Ninth Circuit also does violence to the express provisions of Rule 24, F.R.Civ.P. Rule 24(b) which provides that intervention will not be allowed except upon timely application and a showing that intervention will not prejudice the rights of the defendants. The decision of the Ninth Circuit paid no heed to such requirements of the Rule or to the findings of the District Court. Moreover, in ruling upon Respondents' motions to intervene, the District Court properly considered a variety of other factors pertinent to intervention and on the basis of such factors exercised its discretion to deny permissive intervention. The Ninth Circuit clearly erred in reversing such discretionary ruling inasmuch as it did not find any abuse of discretion by the District Court.

ARGUMENT.

I.

The Filing of an Invalid Class Action Could Not and Did Not Abridge, Enlarge or Modify the Substantive Barring Provisions of Section 5(b) of the Clayton Act.

In its decision respecting the class action, the District Court found "that the first prerequisites to a class action have not and cannot here be met."[29] On December 4, 1969, the Court entered an order that the instant case "* * * may not be maintained as a class action and, no parties having joined therein, the class action, * * * in all respects stands terminated as of May 13, 1969, the date of the filing of the Complaint herein."[30]

Nevertheless, the Ninth Circuit reversed the District Court's order denying leave to intervene and found the statute of limitations satisfied for purported class members by the filing of an invalid class action:

> "* * * [W]e hold that as to members of the class Utah purported to represent, and whose claims it tendered to the court, suit was actually commenced by Utah's filing. The claims of appellants were then before the court and the only question was as to the manner in which they should be entertained on the merits. The requirements of § 5(b) were then met."[31]

Anomalously, the Ninth Circuit Court found the purported class members to be before the District Court

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[29]A. 353; R. 356. 49 F.R.D. 17, at 21.

[30]A. 345; R. 347.

[31]Petition for a Writ of Certiorari, Appendix D, at 38.

for purposes of relating their motions to intervene back to the date of the filing of Utah's complaint, despite the fact that the action was not maintainable as a class action. The decision is predicated upon a premise which is self-contradictory, *i.e.*, that even though the statutory prerequisites to a class action are not met, the claims of parties who are not authorized to be before the Court pursuant to Rule 23 were, in fact, before such Court pursuant to such Rule. No authority has been cited by the Court for this astounding proposition. We have heretofore noted the finding of the trial court[32] "that the first prerequisites to a class action have not and cannot here be met." The Court of Appeals did not and could not elucidate how Respondents were before the Court when they were unable to meet such prerequisite of Rule 23. Indeed, it is well settled that legal consequences flowing from the proposed class action "must be found within the four corners of amended Rule 23 * * *."[33] The Second Circuit held in response to the argument that social purposes compelled a liberal interpretation of Rule 23 as follows:

> "* * * But none of these considerations justify disregarding, nullifying or watering down of the procedural safeguards established by the Constitution, or by congressional mandate, or by the Federal Rules of Civil Procedure, including amended Rule 23. It is a historical fact that procedural safeguards for the benefit of all litigants constitute some of the most important and salutary protections against oppressions, including oppressions by those whose intentions may be above reproach.

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[32]A. 353; R. 356.

[33]*Eisen v. Carlisle* (2d Cir. Op. May 1, 1973) ATRR No. 612, May 8, 1973 at F-1, F-4.

> * * * Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation. Nor could it do so as the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure provides that 'such rules shall not abridge, enlarge or modify any substantive right.' "[34]

A. Judicial Decisions on the Effect of Instituting a Class Action on the Running of the Statute of Limitations.

Under the old Rule 23, the lower courts were divided on the question of whether the filing of a valid spurious class action permitted intervention by class members to relate back to the filing of the suit and thus avoid the bar of the statute of limitations.[35] *Union Carbide & Carbon Corp. v. Nisley*[36] is the leading case for the proposition that a proper spurious class action permits all class members to relate their claims back to the original complaint.[37] Other courts have held that each class member must be able to satisfy the statute of limitations by individual reference to their own cause of action and without relating to any other complaint. Thus, in *Pennsylvania Co. v. Insurances,*

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[34]*Eisen v. Carlisle & Jacquelin,* 1973 Trade Cases, ¶ 74,476, at page 94,117.

[35]Apparently the commencement of a true class suit tolled the statute as to all class members on the theory that the members of the class would be bound by any judgment; all true class members were deemed to be before the court from the inception of the suit. *See,* MOORE'S FEDERAL PRACTICE, Vol. 33, ¶ 23.12, at 23-2918-19, and cases there cited.

[36]300 F.2d 561 (10th Cir. 1961).

[37]The Tenth Circuit has followed the rationale of the *Nisley* decision on tolling under the new Rule 23 even where the district court finds no class action but the Court of Appeals reverses and finds that there was a properly constituted class action. *Esplin v. Hirschi,* 402 F.2d 94 (10th Cir. 1968).

etc. Deckert,[37a] the court held that even as to a properly pleaded spurious class action, additional plaintiffs could not intervene after the statute of limitations had run as to them. *Accord, P. W. Husserl, Inc. v. Newman.*[37b]

In no instance did any court under the old rule ever find that there was a tolling of the statute or a vicarious relation back where there had been no proper class action, whether there were true or spurious class allegations in the original complaint.[38]

Under the new Rule 23, so far as we are aware, there have been only two district court cases which have held that where there is a properly maintainable class action the statute of limitations is tolled and class members may relate their claims back to the date of the original complaint.[39]

Where there has been an invalid class action filed, five district courts have by way of *dicta* made varying

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[37a]123 F.2d 979 (3d Cir. 1941).

[37b]25 F.R.D. 264 (S.D. N.Y. 1960).

[38]The cases relied upon by Respondents in opposing certiorari are cases in which class actions were properly alleged. In *Union Carbide & Carbon Corp. v. Nisley,* 300 F.2d 561 (10th Cir. 1961), the court stated that tolling is allowed as to class members only when a valid class action is found to exist. The basis upon which that court, and those which are in agreement with it, allowed tolling was by means of the fiction that the filing of a class action by one member constitutes a vicarious filing by each member of the class who decides to join. Such rationale is clearly absent when there is no class. In such instance, there can be no vicarious filing. *Esplin v. Hirschi,* 402 F.2d 94 (10th Cir. 1968) is identical in principle. The crux of the Court's decision is that the members of the class were before the Court because the action was properly maintainable as a class action. *Accord, DePinto v. Provident Security Life Insurance Company,* 323 F.2d 826 (9th Cir. 1963); and *York v. Guaranty Trust Co. of New York,* 143 F.2d 503, 529 (2d Cir. 1944).

[39]*Philadelphia Electric Co. v. Anaconda American Brass Co.,* 43 F.R.D. 452 (E.D. Pa. 1968); *State of Minnesota v. United States Steel Corporation,* 44 F.R.D. 559 (D. Minn. 1968).

pronouncements on the possible effect of the class action complaint on the statute of limitations.

Abercrombie v. Lum's, Inc., 345 F.Supp. 387, 394 (S.D. Fla. 1972); [In denying a class action, the court pointed out by way of dictum (345 F.Supp. 394, n. 13): "The statute of limitations would be no bar to those franchisees who could show that they in fact relied on the pendency of this case as a class action. *Buford v. American Finance Co.*, 333 F.Supp. 1243 (N.D. Ga. 1971); *see* Ratner v. Chemical Bank, *supra* at 1017, n. 4; Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 460-461 (E.D. Pa. 1968). As to any others, Rule 23 obviously was not designated to revive stale claims."]

Buford v. American Finance Co., 333 F.Supp. 1243, 1252 (N.D. Ga. 1971); [In denying the class action but indicating that class members who relied on the class complaint may relate back, the court stated a cautioning note (333 F.Supp. 1251): "* * * the plain truth is that in many cases Rule 23(b)(3) is being used as a device for the solicitation of litigation. This is clearly an 'undesirable result' which cannot be tolerated."].

Ratner v. Chemical Bank New York Trust Co., 54 F.R.D. 412, 414 (S.D. N.Y. 1972); [The court denied a class action even though it cut off the rights of class members against whom the statute of limitations had run. It pointed out (54 F.R.D. 414):

"(5) No other member of the proposed class has evinced an interest in the lawsuit

or brought a similar suit elsewhere, and the one-year limitation period in 15 U.S.C. § 1640(e) has long since expired."

This affords a striking parallel to this action. In the instant suit, interveners evinced no interest in this action prior to the time they were solicited to sue by counsel for the State of Utah.]

Rogers v. Coburn Finance Corp. of DeKalb, 54 F.R.D. 417, 419 (N.D. Ga. 1972); [In refusing to vacate a prior order terminating the class action, the court stated (54 F.R.D. 419):

"* * * as this court pointed out in *Buford,* the members of the class plaintiff seeks to represent may still bring their own individual actions and may move this court to toll the applicable one-year statute of limitations period upon a showing that they purposely refrained from filing their own actions within the time limit in reliance upon the maintenance of a class action in the instant case."]

Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 452, 460-61 (E.D. Pa. 1968).

[The court held that the action "may be maintained as a class action" on behalf of certain classes of plaintiffs. In its opinion, the court stated as follows, 43 F.R.D. 460-61: "Where the class action determination is affirmative, the court is merely declaring that the action may be 'maintained' as a class action, and it seems reasonably clear that

this determination relates back to the date of filing of the complaint. (For this reason, I reject the defendants' contention that an affirmative determination in these cases would constitute an invalid enlargement of the statute of limitations). But where the determination is negative, and a class action is, in the words of the Committee, 'stripped of its character as a class action' (39 F.R.D. at p. 104), it does not necessarily follow that the case must be treated as if there never was an action brought on behalf of absent class members."]

The decision of the Ninth Circuit in this case is the only one to date that actually *holds* that the statute of limitations is tolled as to all claims by the mere mechanical act of a private party erroneously designating its cause of action as a purported class action under Rule 23, F.R.Civ.P.

B. The Ninth Circuit's Decision Abridges the Substantive Provisions of Section 5(b) of the Clayton Act.

On May 24, 1969, the tolling period contemplated by Section 5(b) of the Clayton Act came to an end for purposes of this case. It follows that applicants could not present their claims after the period allowed by such statute unless the mere mechanical act of typing the words "class action" on the complaint had the effect of abrogating the requirements of Section 5(b). Indeed, Respondents' brief in opposition to the Petition for a Writ of Certiorari (at 9) correctly posed the ultimate question herein, *i.e.*, "whether the Clayton Act statute of limitations is tolled for purported members of a class when the action is filed before but denied

after the date that the limitations run." Can Respondents, who had the opportunity to join one of several previous class actions involving the subject matter of this action, avoid the bar of Section 5(b) of the Clayton Act by Utah's mechanical act of erroneously designating the action as still another class action?

The Supreme Court has never ruled whether the filing of a valid or invalid class action under Rule 23 affects the running of any statute of limitations as to the purported class members, including Section 5(b) of the Clayton Act and the numerous other statutes of limitations enacted by Congress.

Petitioners have a substantive right conferred by Congress to bar antitrust actions not brought within the time prescribed in 15 U.S.C. §§ 15b and 16b. Congress granted injured persons treble damage actions in the antitrust area and explicitly required that such actions be brought within congressionally delineated time periods. Such Congressional purpose was ably summarized by Judge Pence as follows:

> "* * * In § 5(b) Congress not only created new rights for antitrust plaintiffs but also clearly created obverse rights for antitrust defendants. * * * Specifically tailored as they were for antitrust litigation, this court cannot but determine that § 5-(b) certainly, and § 4B rationally, were intended by Congress to become an integral part of the entire antitrust legislative scheme." (A. 497; R. 460. 50 F.R.D. 99, at 107-08).

Congressionally conferred rights can only be taken from Petitioners by act of Congress and cannot be

abrogated by judicial resort to rules of procedure. "Amended Rule 23 was not intended to affect the substantive rights of the parties to any litigation. Nor could it do so as the Enabling Act that authorizes the Supreme Court to promulgate the Federal Rules of Civil Procedure provides that 'such rules shall not abridge, enlarge or modify any substantive right.' "[40]

In the present case, legal fiction aside, it is uncontroverted that Respondents took no action to intervene until a date more than six months after the termination of the one-year suspension period provided by Section 5(b) of the Clayton Act.[41] The decision of the Ninth Circuit clearly contradicts Section 5(b) of the Clayton Act since it eliminates the requirement that the litigant bring his action either (a) within the suspension period, *i.e.*, within 1 year after the Government suit had terminated or (b) within 4 years after his cause of action accrued. Such decision also abridges the substantive rights of antitrust defendants to bar stale claims pursuant to Section 5(b) of the Clayton Act. Indeed, the Ninth Circuit has held in other cases that "the right to bar an action for lapse of time

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[40]*Eisen v. Carlisle & Jacquelin*, 1973 Trade Cases, ¶ 74,476, p. 94,111 at p. 94,117 (2d Cir. 1973).

[41]Under the language of Section 5(b) of the Clayton Act, the barring provisions of Section 5(b) of the Clayton Act would have been triggered by termination of the Government criminal action on June 19, 1964. However, in *Maricopa County v. American Pipe and Construction Co., et al.*, 303 F.Supp. 77 (D. Ariz. 1969) Judge Pence held that a second Government civil action had a further tolling effect and that such tolling continued until May 24, 1969, one year following the termination of the Government civil actions as to the last defendant, American. Respondents' motion to intervene was not filed until December 12, 1969.

is a substantive right."[42] It follows that the decision of the Ninth Circuit at issue herein is in direct contradiction with the principles enunciated by this Court:[43]

> "* * * The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all * * * Time has been made of the essence of the right, and the right is lost if the time is disregarded. The liability and the remedy are created by the same statutes, and the limitations of the remedy are, therefore, to be treated as limitations of the right."

Similarly, Congress saw fit to limit private claims for violations of the securities laws to a one-year period.[44] A variety of other federal statutes of limitation are also within the ambit of the judgment of the Ninth Circuit at issue herein (Examples thereof [twenty-six in number] are set forth in Appendix G, Petition for Writ of Certiorari, 54-58). The policy underlying each of such statutes would clearly be thwarted by the tolling exception created by the Ninth Circuit in the instant action. As a result of the decision herein, the Ninth Circuit has engrafted yet another judicially created exception onto the various statutes of limitation that have been established by Congress. As stated before, it has ignored altogether the well-established principle that rules

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[42] *John E. King v. Alaska Steamship Company*, 431 F.2d 994, 996 (9th Cir. 1970).

[43] *The Harrisburg v. Rickards*, 119 U.S. 199, 214 (1886), *rev'd on other grounds, Moragne v. States Marine Line*, 398 U.S. 375, 26 L.ed.2d 339, 361, 90 S.Ct. 1772 (1970).

[44] 15 U.S.C. §§ 77m, 77www, 78i and 78r.

of procedure such as Rule 23 cannot be employed to abridge or enlarge substantive rights.[45]

Under the Opinion of the Ninth Circuit, Respondents can accept the benefits of the tolling provisions of Section 5(b) of the Clayton Act which enables the State of Utah to bring the action and at the same time repudiate its barring provisions. By attempting to invoke the benefits of the tolling provisions of the statute of limitations without accepting the obligations imposed by the same provisions, Respondents are urging an interpretation of this statute which is plainly at odds with the principles enunciated by this Court in *The Harrisburg, supra,* and with the accepted canon of statutory interpretation that the statute must be construed as a whole in the light of its purpose.[46] It is likewise inconsistent with the rule that tolling exceptions cannot be engrafted upon Section 5(b) of the Clayton Act.[47]

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[45] *Eisen v. Carlisle & Jacquelin,* 1973 Trade Cases ¶ 74,476, p. 94,111 (2d Cir. 1973); *Philadelphia Electric Co. v. Anaconda American Brass Co.,* 43 F.R.D. 452, 460 (E.D. Pa. 1968).

[46] *cf. Worcester Felt Pad Corp. v. Tucson Airport Authority,* 233 F.2d 44, 49 (9th Cir. 1956).

[47] *Hall v. E. I. Du Pont De Nemours & Co.,* 312 F.Supp. 358, 360 (E.D. N.Y. 1970) The court refused to engraft a tolling exception onto Section 5(b) and pointed out:

> "The power to create tolling exceptions judicially is limited by the general rule that, when a federal statute of limitations exists, it acts as a total bar, extinguishing the right to sue accorded by other statutory provisions."

District Judge Martin Pence set forth the applicable principles of law in the following scholarly language:

> "If the analyses of Justices Waite and Douglas and Judge Learned Hand on the bar on limitations in the context of rights created by statute are valid, then within the purview of the § 5(b) at least, any enlargement of tolling of that statute by virtue of the Rules cannot rationally be categorized as procedural.
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> * * *
>
> "By judicial equitable fiat, § 4B is tolled by fraudulent concealment. By the legislative ukase of § 5(b), it is further

(This footnote is continued on next page)

Rules 23 is after all a judicial creation. It affords no basis for procedural excesses or for abridging substantive rights of the Petitioners. To deal with the Rule on its own terms is difficult at best. To create a judicial fiction that purported class members of a non-existent class action are before the court, and action taken later by purported class members relates back to the original complaint in order to defeat the statute of limitations, is to obscure bald usurpation of Congressional authority by the Ninth Circuit under the guise of implementing procedural rules. The congressional statute of repose has been violently wrenched, if not replaced, by the Ninth Circuit's interpretation of Rule 23. This is contrary to the elementary principle that court rules are subject to congressional statutes; rules and statutes are subject to the Constitution. We submit that the decision of the Ninth Circuit is contrary to the principles enunciated by this Court in *Snyder v. Harris*[48] which clearly delineated this proper priority. The court in *Snyder* found that Rule 23 could not be used to aggregate claims of class members to meet the statutory requirement of jurisdiction in diversity cases.

Even where a true class exists the class is not an entity; it consists of persons with separate claims. Rule

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tolled by government suit. In the context of the facts of this case, plaintiff would have the tolling period specified by § 5(b) additionally tolled by virtue of the Rules of Civil Procedure.

* * *

"It thus appears to this court that the only statutory 'right' given to a defendant in an antitrust case, viz., the right to interpose the bar of limitations to attempted tolling of § 5(b) by Rule 23, F.R. Civ.P., is a substantive right—as a necessary segment of the total sphere of antitrust legislation. Any attempt to additionally toll § 5(b) via the Federal Rules of Civil Procedure would appear to be an abridgement of that substantive right." (A. 496-97; R. 459-60. 50 F.R.D. 99, 107-08).

[48]394 U.S. 332 (1969).

23 was established as a procedural device to facilitate the adjudication of individual claimants. By analogy, individual class members (in this case of a non-existent class) must each satisfy the statutory requirements of the statute of limitations. There cannot be a judicial created agglomeration, a court sponsored entity, which appears *ipso facto* before the Court simply on the filing of a complaint reciting the language of Rule 23. The decision of the Ninth Circuit herein is the only one to date that holds that the statute of limitations is tolled as to all claims by the mere mechanical act of a private party in erroneously designating its purported cause of action as a class action under Rule 23, F.R.Civ.P. Such decision must be reversed because it is not supported by any rationale or precedent and conflicts with the congressional policy underlying the statutes of limitations abrogated thereby.

II.

The Decision of the Ninth Circuit, if Left Undisturbed, Will Create Substantial Problems in the Administration of Both Rule 23 and Rule 24, F.R.Civ.P., and Will Deprive Defendants of Due Process of Law.

A. The Problems Inhering in Rule 23.

The Ninth Circuit has held in essence that permissive intervention of purported class members must be granted where the class has been denied and the claims of purported class members would otherwise be barred by the statute of limitations. We submit that such a use of the rules of procedure by the judiciary to skirt congressionally enacted statutes of limitations will result in serious mischief for judicial administration of multi-party litigation. It is an open invitation for lawyers to

dutifully recite the litany of Rule 23 allegations and thus toll the statute as to potential class members regardless of the merits of the class claim; solicitation of class members will be assured and many otherwise uninterested litigants may be conscripted for the litigation.

Not long after the new Rule 23 was adopted, Judge Lumbard in dissenting in *Eisen v. Carlisle & Jacquelin*[49] on its first appearance in the Second Circuit, described the Rule as a "Frankenstein monster." Judge Lumbard proved to be remarkably accurate. After some five years of unbelievable procedures at the trial level after remand—during which the district judge bent procedure and substance in an attempt to make the class action viable—Judge Medina concurred with Judge Lumbard on the second appearance of *Eisen* in the Second Circuit. That Court dealt with most of the evils of the amended Rule and Judge Medina made the following observations respecting Rule 23:

> "*Even if amended Rule 23 could be read so as to permit any such fantastic procedure, the courts would have to reject it as an unconstitutional violation of the requirement of due process of law. But as it now reads amended Rule 23 contemplates and provides for no such procedure.* Nor can amended Rule 23 be construed or interpreted in such fashion as to permit such procedure. We hold the 'fluid recovery' concept and practice to be illegal, inadmissible as a solution of the manageability problems of class actions and wholly improper."
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> * * *
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> "Class actions have sprouted and multiplied like the leaves of the green bay tree. No matter how

[49] 391 F.2d 555, 572 (2d Cir. 1968).

numerous or diverse the so-called class may be or how impossible it may be ever to compensate the individual members of the class, a champion steps forth. * * * *So far as we are aware not a single one of these class actions including millions of indiscriminate and unidentifiable members has ever been brought to trial and decided on the merits. But the preliminary procedures, including the preliminary mini-hearing on the merits, such as those conducted by Judge Tyler in order to decide whether or not this case was a proper class action, and the huge and unavoidable expense of producing witnesses and documents pursuant to discovery orders, have brought such pressure on defendants as to induce settlements in large amounts as the alternative to complete ruin and disaster, irrespective of the merits of the claim.*"[50] (Emphasis added).

Rule 23 has also come under close scrutiny by scholars, attorneys and the district courts. Recognition is being given to the fact that the Rule has serious defects and is creating great problems in the administration of justice. A special committee of the American College of Trial Lawyers reported the following:

"The conclusion of this Committee is that Rule 23, as written and as applied over the last half decade, has failed to achieve its purposes. We suggest that in the areas of judicial economy and fairness to the parties, the experienced results have been directly contrary to the intended purposes. The (b)(3) class suit has mandated heavy expenditures of judicial time, effort and expense. The

[50] *Eisen v. Carlisle & Jacquelin*, 1973 Trade Cases, ¶ 74,476, p. 94,111 at p. 94,121.

expenditures have been sustained only by sacrificing procedural and substantive fairness to the party opposing the class. Nor does it appear that these burdens can in any sense be justified by the limited benefits accruing to class claimants."[81]

Mr. Earl E. Pollock, writing in the *Business Lawyer*, summarized the judicial corner cutting, the abandonment of procedural and substantive rights and the creation of a double standard for Rule 23 proceedings resulting from the misguided zeal of some courts to implement class actions at the expense of constitutional and statutory safeguards. As a keen observer of the class action in practice, Mr. Pollock has demonstrated the deleterious effects that class actions have had on the orderly administration of justice in the following language, *i.e.*:

> "Thus, in the name of 'flexibility' and 'discretion,' a kind of double standard has been emerging: in litigation other than class actions, prescribed substantive requirements and basic procedures continue to govern; but in class actions, primarily in order to make them 'managable,' at least some courts have sanctioned a contraction of both defendants' rights and plaintiffs' obligations. This double standard is almost routinely rationalized by the now-familiar litany that it would 'emasculate' Rule 23 or 'sound the death knell' of class actions to apply established principles. Instead of determining whether a proposed class action would be 'manageable' within a framework of such principles—including constitutional and statutory re-

[81]Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure, American College of Trial Lawyers (March 15, 1972), at pages 5-6.

quirements—these courts have shown an alarming tendency to decree changes in the principles to make the case 'manageable.'

"Such an approach—placing Rule 23 *uber alles* —represents a complete reversal of what naive lawyers like myself always thought was the governing hierarchy of values in our legal system—*that court rules are subject to statutes, and that both court rules and statutes are subject to the higher authority of the Constitution.*

* * *

"The double standard has encompassed not only substantive rights but constitutional rights as well. Take, for example, the device of awarding the class a lump sum recovery to avoid separate trials on damage issues.

* * *

"Similar subordination of constitutional rights to the exigencies of Rule 23 is implicit in other procedural shortcuts devised to make class actions 'manageable.' It is proposed that defendants be denied any opportunity to cross-examine claimants; that questions of impact and damages be decided in the abstract or on affidavits, rather than testimony; and that this be done by a special master or committee of counsel, rather than by a jury.

* * *

"Yet some courts—not including, however, the Court of Appeals for the Seventh Circuit—have held that such discovery is not permitted in class actions except as to the class representative. They have taken this position on the extraordinary ground that other class members—even though they have not 'opted out' and ostensibly are de-

manding the payment of millions of dollars—are not 'parties' to the action and that permitting such discovery 'would emasculate Rule 23' and 'would be incompatible with' its rationale."[53] (Emphasis added).

In an oft-quoted statement, Judge Edenfield of the Northern District of Georgia wrote candidly in *Buford v. American Finance Company*, 333 F.Supp. 1243, 1251 (N.D. Ga. 1971):

> "This is an appropriate moment for the court to express its grave concern over the increasing resort to the class action device in actions seeking monetary relief. The class action is supposed to 'achieve ecnomies of time, effort and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.' Advisory Committee's Notes, *supra*, 102-103. Today, however, many claims which simply did not exist have been brought to life by our courts through the judicial act of allowing a class action to be maintained. Although some courts say these claims are not brought because plaintiffs believe the potential recovery would be too small to justify the time and expense of litigation, *the plain truth is that in many cases Rule 23(b)(3) is being used as a device for the solicitation of litigation.* This is clearly an 'undesirable result' which cannot be tolerated. Until otherwise directed this court, for one intends to carefully scrutinize every action in which plaintiffs seek monetary re-

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[53] "Class Actions Reconsidered: Theory and Practice Under Amended Rule 23," Earl E. Pollock, 28 *Business Lawyer* 741 at 746-49 (April 1973).

lief and wish to represent a class of similarly situated persons to determine if all the requirements of Rule 23 are fully satisfied, and it will not hesitate to exercise whatever discretion is granted it by the Rule in such matters." (Emphasis added).

See also,

Schaffner v. Chemical Bank, 339 F.Supp. 329 (S.D. N.Y. 1972);

Cotchett v. Avis Rent A Car System, Inc., 56 F.R.D. 549 (S.D. N.Y. 1972);

Shields v. Valley National Bank of Arizona, 56 F.R.D. 448 (D. Ariz. 1971);

Ratner v. Chemical Bank New York Trust Company, 54 F.R.D. 412 (S.D. N.Y. 1972); and

Rogers v. Coburn Finance Corp. of DeKalb, 54 F.R.D. 417 (N.D. Ga. 1972).

The problem of solicitation of litigants by counsel and the attendant burden upon the judicial system is not simply a matter of intellectual curiosity. The District Court noted that the State of Utah engaged in a program of solicitation in order to find a group of would-be interveners.[53] While we do not suggest or imply that counsel for Utah acted other than with the greatest rectitude, nevertheless, the decision of the Ninth Circuit, if left uncorrected, will encourage, indeed it will invite even more soliciation in future actions.

As a result of the Ninth Circuit's decision, counsel on behalf of future plaintiffs will find it irresistible to

[53]A. 482; R. 447; 50 F.R.D. at 100.

allege class actions. Until such time as a negative order respecting the class action is entered, plaintiffs' counsel can solicit potential class members. Upon the entry of such a negative order, plaintiffs' counsel can then file motions to intervene pursuant to Rule 24(b) on behalf of those potential class members that it has solicited. "Permissive" intervention would, under the Ninth Circuit's decision, have to be granted to such potential class members—even though the statute of limitations may have run long before the motions to intervene were even filed. Class allegations can be anticipated as in complaints where there is little or no hope of meeting the prerequisites of Rule 23.

The absurdity of the Ninth Circuit decision is demonstrated by the application of its rationale to the facts in the *Eisen* case. In the *Eisen* case, a class action complaint has been pending for some five years on behalf of a purported class of six million odd-lot stock buyers, each with an estimated average claim of $1.30. In May of this year the Second Circuit at last found no proper class action could be maintained under Rule 23. Under the reasoning of the Ninth Circuit, the Clayton Act statute of limitations has been tolled for five years for 6,000,000 would-be claimants, any or all of whom are now entitled as of right to intervene in the litigation. The question arises as to whom Rule 23 is intended to benefit. Tolling in that situation does not benefit obviously disinterested claimants. Tolling to permit intervention by such a potentially vast army does not benefit the courts in their already overburdened capacity. Tolling can only be a device to benefit plaintiff's counsel. Thus, in *Hawaii v. Standard Oil Co.*,[84]

[84] 405 U.S. 251 (1972).

the Supreme Court confined Clayton Act treble damage remedy to persons who had been injured in accordance with the statutory requirements. This Court denied antitrust recovery to a state in a claimed *parens patriae* capacity. The opinion of the Ninth Circuit is inconsistent with *Hawaii v. Standard Oil Co.* in that it accords status as litigants to absent (and in many cases unidentifiable) members of such purported class in order to toll the statute of limitations.

B. The Constitutional Questions Involved.

The Ninth Circuit abridgment of the statute of limitations raises procedural due process questions. The Court held:

> "* * * [W]e hold that as to members of the class Utah purported to represent, and whose claims it tendered to the court, suit was actually commenced by Utah's filing. The claims of appellants were then before the court and the only question was as to the manner in which they should be entertained on the merits. The requirements of § 5(b) were then met."[55]

Upon the filing of Utah's complaint, only one party was actually before the court by virtue of having undertaken to assert its alleged claims—Utah. The Ninth Circuit chose to treat the would-be class members as if they had filed suit. Fictions aside, however, they had done nothing. In fact, only seven of the would-be class members were even aware of the existence of Utah's action prior to the running of the statute of limitations (moreover, in their affidavits, the "relying seven" were

[55]Petition for a Writ of Certiorari, Appendix D, at 38.

required to go outside the damage period to establish purchases of pipe during such relevant period).[58]

The decision of the Ninth Circuit, or any procedural rule, which permits intervention by purported class members *after* the statute of limitations has run, may well deny due process of law to defendants. The Federal Rules of Civil Procedure may not be employed in such a manner as to deny due process of law to defendants.

Thus, in *Iocono v. Anastasio,* 79 F.Supp. 378 (S.D. N.Y. 1948), an action was brought by thirty-five specifically named plaintiffs to recover alleged unpaid overtime compensation. The plaintiffs moved for leave to amend a complaint by adding as plaintiffs such other employees of the defendant who may join as plaintiffs in the action before trial. In denying plaintiffs' motion, Judge Medina stated:

> ". . . It will not suffice that someone else has a pending lawsuit against the defendant sought to be charged, in which similar but nevertheless different and separate claims are alleged, and that through some ignorance or excusable neglect reference to the person seeking to intervene and to his separate and individual claim was wholly omitted. No amount of good excuses or equitable considerations of one sort or another can alter the fact that there is not now pendng any action whatever by or on behalf of these individual claimants. Accordingly, the relief prayed for must be withheld. *To hold otherwise would be to dispense with the most elementary requirements of due process.*" (Emphasis added).

Iocono v. Anastasio, 79 F.Supp. 378, 382;

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[58]A. *388-428.* R. 389-438; 50 F.R.D. 99, 101, n. 1.

Longbottom v. Swaby, 397 F.2d 45 (5th Cir. 1968);
Lewis v. Lewis, 358 F.2d 495 (9th Cir. 1966); and
Murfkan v. Kahn, 11 F.R.D. 520 (S.D. Fla. 1951).

We have heretofore established that the right to assert the bar of the statute of limitations is a substantive right. It follows the abrogation of such substantive right by a rule of procedure is in violation of due process of law.[57]

C. Recommended Solution of Rule 23 Problems by the Supreme Court.

We urge the Supreme Court to hold that the filing of a class action does not toll the statute of limitations for absent class members in Clayton Act treble damage cases. This Court should establish the principle that each individual of the purported class must independently satisfy the statute of limitations requirements. It would be incumbent upon each individual to take such positive action as would satisfy the requirements of Rule 8, F.R.Civ.P. *prior* to the running of the statute of limitations contained in the Clayton Act. The filing of a class action would be a completely neutral factor that would have no bearing on whether would-be claimants have satisfied the statute of limitations by taking the minimum positive steps contemplated by Rule 8.

Such a pronouncement by this Court would aid the courts in approaching Rule 23 as an exclusive procedural device where the determination of whether there is a proper class action would be made by reference to the requirements of the Rule secure with knowl-

[57] *King v. Alaska Steamship Company*, 431 F.2d 994 (9th Cir. 1970).

edge that the decision, whether affirmative or negative, would have no effect on the substantive rights of any of the litigants. Removal of substantive impact of class-action decisions would go far toward meeting the problems raised by Mr. Justice Black in dissenting from promulgating the amended rules.[58]

To put an end to the fiction that purported class members are before the court automatically as of the time a complaint with class allegations is filed would work no hardship on litigants or the courts. If a person has a claim he wishes to pursue, it is not requiring too much to have him take the very modest steps required by Rule 8 if he wishes his rights adjudicated. If a statute of limitations is deemed too short, it is for the Congress to extend it. The courts will not be burdened since experience under class actions has shown a reluctance by most purported class members to take positive action to come into the case. Most persons have no interest in engaging in litigation; most are conscripted in class actions. There would be no deluge of simultaneous claims filed in several different jurisdictions. If, in a rare case, there were a multiplicity of filings, the courts have adequate procedural powers to consolidate such claims in the most efficient manner. A more likely result would be a reduction in solicitation of claims and a diminished number of claims being prosecuted in the federal courts.

Experience under Rule 23, F.R.Civ.P., demonstrates the need for the Supreme Court to reassert the limited *procedural* aspects of the class action and to reemphasize the basic principles that Rule 23 cannot abridge either statutory or constitutional rights of defendants.

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[58]383 U.S. 1032, 1035 (1966).

III.

The Decision of the Ninth Circuit Contravenes the Provisions of Rule 24, F.R.Civ.P., Established by the Supreme Court.

The opinion below of the Ninth Circuit apparently assumed that the District Court's decision denying permissive intervention was a ruling as a matter of law that the claims of all interveners were barred by Section 5(b) and did not constitute an exercise by Judge Pence of his discretion.

One of the factors considered by the District Court in denying Respondents' motions to intervene was the history of the West Coast Pipe Cases which had been pending for five years prior thereto. In such cases, Respondents could have joined one of the several class actions which described classes including the Respondents. Had they done so, they could have raised their claims in a timely and expeditious manner. They chose not to do so. Thereafter, they could still have raised their claims prior to the running of the limitations' period. The District Court's opinion denying class action status, which was incorporated by reference in its opinion denying interventions[59] noted that counsel for the State of Utah had been reviewing the action in the West Coast Pipe Cases for "over six months before the statute of limitations ran"[60] and thus, Utah was charged with knowledge of the prior class actions and the attendant problems respecting further class actions.[61] During such period, Respondents' counsel

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[59]*State of Utah v. American Pipe and Construction Co., et al.*, 50 F.R.D. 99 (C.D. Cal. 1970). A. 482-502; R. 447-65.

[60]*State of Utah v. American Pipe and Construction Co., et al.*, 49 F.R.D. 17, 21 (C.D. Cal. 1969); A 354; R. 356-57.

[61]"The court notes from plaintiff's affidavits that the Attorney General of the State of Utah and Attorney Miller sometime in

could either have filed separate actions on their behalf (and have consolidated such actions for trial) or have sought joinder of any Respondent authorizing Plaintiff Utah to bring suit on its behalf (Rule 20(a) F.R.Civ.P.).

After six months of study of their purported cause of action, Respondents were charged with the knowledge that a further class action was not feasible. With such knowledge Respondents chose the device of still another class action. As found by the Trial Court:

"1. All governmental bodies in the alleged 'class' who may feel themselves injured by any alleged 'Western Pipe' conspirators had over five years from at least March 10, 1964, to May 23, 1969, to seek redress, jointly or severally. Each has at all times been represented by counsel. No 'Creditors' bill' situations are here involved.

"2. No more than seven of petitioners ever discussed with plaintiff's attorney the possibility of a pipe antitrust suit against the defendants herein. Nothing appears in any of their affidavits to

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October 1968—over six months before the statute of limitations ran—started a study of the western pipe conspiracy. Any detailed study of the litigation then and theretofore pending in the western pipe cases would have disclosed the facts which this court has above recited. A study of the law on the application of a class action to pipe cases as reflected in City of New York v. International Pipe & Ceramics Corp. (44 F.R.D. 584, S.D.N.Y., April 16, 1968) reported in Trade Regulation Reports shortly thereafter and in Federal Rules Decisions in November 1968, should also have raised a caveat in Utah's determination of the law which might be applied to the present litigation. It should have been unquestioned on the part of the plaintiff's attorneys that individual action by affected parties, particularly the states, large cities and other large public entities in the Western Area, should have been taken long before any class action was belatedly filed in this case, if in fact any of them believed the alleged conspiracy had injured them." 49 F.R.D. 17, 21; A. 354; R. 356-57.

indicate why they should have 'relied' on Utah's counsel and suit, rather than immediately proceed to process their own claims and suits. None was foreclosed from filing his own suit by the fact that plaintiff's attorneys planned to file a class action. None of the petitioners moving to intervene were entitled to rely upon such action as a class action.

"3. * * * [T]here is insufficient showing by any of the aforesaid petitioners that they properly relied upon the purported class action brought by the State of Utah; and the Court, therefore, finds that none of such parties did in fact rely upon such action as a class action.

"4. The granting of any of the aforesaid motions to intervene or to amend the Complaint would violate the rights of defendants to fairness and due process.

"5. The tolling of the statute of limitations based upon the government actions pleaded in Paragraph VIII of the Utah Complaint, which tolling is also pleaded in each of the proposed causes of action by each of the parties moving to intervene herein, ceased on May 24, 1969; and insofar as any of the proposed causes of action by said parties moving to intervene herein is based upon the aforesaid government actions pleaded in Paragraph VIII of the Utah Complaint, such action is barred by the applicable statute of limitations.

"6. *There never was a class within the meaning of Rule 23, F.R.C.P., as alleged in the Complaint herein, and the members of the purported 'class' described herein cannot claim that they started their suits, vicariously, before the tolling period expired.*"[23] (Emphasis added).

[23] A. 506-07; R. 444-45.

In addition to the factors reflected in the foregoing Findings of Fact, the District Court considered the prejudice to the defendants which would result from intervention:

> "It thus appears to this court that the only statutory 'right' given to a defendant in an antitrust case, viz., the right to interpose the bar of limitations to attempted tolling of § 5(b) by Rule 23, F.R.Civ. P., is a substantive right—as a necessary segment of the total sphere of antitrust legislation. Any attempt to additionally toll § 5(b) via the Federal Rules of Civil Procedure would appear to be an abridgement of that substantive right."[63]

In that regard, the District Court stated in its opinion denying intervention:

> "* * * [T]o permit even a limited intervention on the part of petitioners for the purpose of conducting joint discovery proceedings would be in the context of this case, seriously prejudiced the rights of the defendants, and necessarily complicate and delay resolution of discovery problems arising in Utah's case."[64]

In exercising its discretion the Court also considered the fact that in order to find a group of interveners, the State of Utah engaged in a program of solicitation.[65] It is also pertinent that in exercising its discretion the trial court likewise considered the character of the purported claims of Respondents. The trial court

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[63]A. 497; R. 460.
[64]A. 486; R. 451.
[65]50 F.R.D. 100. A. 482; .R 447.

indicated in its footnote number one that even the so-called "relying seven" had to go outside the damage period in order to show purchases of pipe which could have been actionable.[66] Additionally applicants have made no showing whatever that their purchases of pipe were of a category on which the statute had not run.[67] Of the applicants in intervention, thirty-seven (or more than one-half) did not show any evidence whatsoever of having made any purchases of pipe. Twenty-seven of the remaining applicants stated that they made pipe purchases of some kind, but did not limit such showing to the 1954-1962 damage period. Several of the applicants did not even show any pipe purchases during the 1954-1962 damage period.[68]

All of the foregoing factors were considered by the District Court in exercising its discretion. In so doing, the District Court was fulfilling the mandate of Rule 24(b) that "in exercising its discretion, the Court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

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[66]*State of Utah v. American Pipe and Construction Company*, 50 F.R.D. 99, 101 (C.D. Cal. 1970). A. 483; R. 448.

[67]A. 284-312; R. 286-315. American was not a party to two of the Government civil actions—those involving steel large and small diameter pressure pipe. See footnote 13, *supra*.

[68]A. 388-428; R. 389-439.

A. The Decision Below Reversing a Discretionary Ruling of the District Court Was Not Based on a Showing of Abuse of Discretion and Is, Therefore, in Conflict With the Decisions of This Court and With Other Circuits as Well as the Plain Language of Rule 24(b), F.R.Civ.P.

In its opinion of January 31, 1973, the Ninth Circuit held:

> "The order of the District Court is affirmed as to intervention under Rule 24(a). As to intervention under Rule 24(b), the matter is remanded with instructions that the order be vacated and for further proceedings upon the motions."[69]

The decision of the Ninth Circuit simply ignored the discretionary portion of the District Court's opinion and all of the factors (as set forth hereinabove) that were considered by the District Court. Such discretionary decision should, however, have been given the greatest latitude by the Ninth Circuit. By virtue of having presided over the West Coast Pipe Cases the District Court was familiar with all respects of that litigation and of the facts underlying Respondents' alleged causes of action. Such experience and factual background made the District Court uniquely qualified to weigh all the factors pertinent to intervention.

By ignoring the discretionary portion of the District Court's ruling and reversing that ruling on the statute of limitations' issue alone, the Ninth Circuit contradicted a long line of Supreme Court decisions including *Railroad Trainmen v. Baltimore & O. R. Co.*, 331 U.S. 519, 91 L.ed. 1646 (1947)[70] and decisions of

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[69]Court's Opinion, Petition for a Writ of Certiorari, Appendix D at 39).

[70]*See also, Allen Calculators, Inc. v. National Cash Reg. Co.*, 322 U.S. 137, 142 (1943).

the Sixth, Eighth and Tenth Circuits[71] that have held that discretionary decisions of the District Courts are to be reversed *only* upon a clear showing of abuse of discretion. Heretofore, no appellate court had reversed such a discretionary decision except upon a clear showing of abuse of discretion. The principle is so well established as not to be subject to question. Thus, the decision below is so at odds with the principles established by this Court and followed by other Circuits that it requires correction.

B. The Ninth Circuit's Decision Conflicts With the Heretofore Accepted Principle That a Petition to Intervene Is Measured for Purposes of the Statute of Limitations as of the Date It Was Filed.

A petition to intervene in an action must satisfy any applicable statute of limitations. That is to say, the party seeking to intervene must place its claims before the court prior to the time that those claims became barred by a statute of limitations.

As was stated in *Kam Koon Wan v. E. E. Black, Ltd.*, 75 F.Supp. 553, 564 (D. Hawaii 1948):

> "* * * Under ordinary rules, since the filing of a petition to intervene marks the introduction of a new party and a new cause of action the situation is measured for the purposes of the statute of limitations as of the date it was filed. If that date was not within the time limited, the intervention is barred."[72]

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[71] *See, FMC Corporation v. Keizer Equipment Company*, 433 F.2d 654, 656 (6th Cir. 1970); *Bumgarner v. Ute Tribe of Uintah and Ouray Res.*, 417 F.2d 1305, 1309 (10th Cir. 1969); *Edmondson v. State of Nebraska*, 383 F.2d 123, 127 (8th Cir. 1967); and *Stadin v. Union Electric Company*, 309 F.2d 912 (8th Cir. 1962).

[72] *Accord, Athas v. Day*, 161 F.Supp. 916-19 (D.Col. 1958); *cf. Hobbs v. Police Jury of Morehouse Parish*, 49 F.R.D. 176, 179-80 (W.D. La. 1970).

Decisions allowing intervention in class actions after the running of a statute of limitations are simply inapplicable. There was no class action in the present case.

C. The Decision of the Ninth Circuit Established Mandatory Rather Than Discretionary Intervention Under Rule 24(b), F.R.Civ.P.

In its opinion below the Ninth Circuit announced an unprecedented and unsupported rule to the effect that whenever a class action is filed, anyone who is purportedly a member of that class must be permitted to intervene if the class is found not to be properly constituted under Rule 23 and if the alleged members of the class would otherwise be precluded from filing suit by the statute of limitations. The Ninth Circuit recognized that the practical effect of its decision was to render certain classes of permissive intervention mandatory:

> "This being so, it did not lie within the discretionary province of the District Court to deprive them of the eleven days balance of time remaining to them under § 5(b)."[73]

Thus, although the Ninth Circuit pays lip service to approving and affirming the decision of the lower court that Respondents were not entitled to intervention as a matter of right under Rule 24(a), the decision converts all 24(b) discretionary interventions into mandatory intervention as of right if the statute of limitations has run against the would-be class members.

The Ninth Circuit did not attempt to square its holding with the provisions of Rule 24(b) as promulgated

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[73]Petition for a Writ of Certiorari, Appendix D at 39.

by the Supreme Court or the entire body of case law thereunder. It could not do so because discretionary intervention cannot be squared with intervention as of right. Thus the opinion constitutes a judicial repeal of Section 24(b), F.R.Civ.P.

D. The Ninth Circuit's Decision Contravenes the Mandate of Rule 24(b), F.R.Civ.P., That the Trial Court Shall Consider Whether Intervention Will Prejudice the Original Parties.

Rule 24(b), F.R.Civ.P., mandates that the district court, in exercising its discretion thereunder: "* * * shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."[74] The Ninth Circuit paid no heed to the Trial Court's finding that intervention would seriously prejudice the original parties. Prejudice to the defendants resulting therefrom is self-evident and is underscored by the history of the West Coast Pipe Cases. After widespread publicity and requests for intervention, a settlement was made therein upon the payment of more than $21,000,000 to approximately 350 claimants. United States Steel Corporation, Kaiser Steel Corporation and Martin-Marietta paid approximately $4,000,000 more than their pro rata share of the settlement. Such double payment by the defendants would not have been made but for the understanding of defendants that all claims arising from the alleged conspiracy were settled.[75] Thus, the Trial Court arrived at the inevitable conclusion that to allow intervention of litigants who slept on their rights for five years would unduly prejudice the rights of defendants herein. The Ninth Circuit's decision in favor of such

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[74]*See, Stadin v. Union Electric Company,* 309 F.2d 912 (8th Cir. 1962).

[75]A. 438-39; R. 490, 493-94.

dilatory litigants is in disregard of the clear mandate of Rule 24(b) against intervention that will prejudice the rights of the original parties.[76]

E. The Applications to Intervene Were Not Timely.

It is elementary that an application to intervene pursuant to Rule 24(b), F.R.Civ.P., can be granted by the District Court only upon timely application. Both the language of Rule 24(b) and the case law so provide.[77]

The Complaint in this action has been pending since May 3, 1969. It is based upon Grand Jury indictments early in 1964 and a damage period which extended between 1954 and 1962.[78] Between 1964 and 1967 there were seven prior class actions in which all potential plaintiffs were solicited to intervene and the Respondents herein could have intervened merely by the asking.[79] For a period of six months prior to the date of the filing of the Complaint herein on May 13, 1969, the State of Utah's counsel had been studying the case and is charged with knowledge that the class alleged

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[76]"The trial court may take into account all the circumstances of the case, including any circumstances contributing to delay in the application for intervention. [Citing cases] * * * '[T]he most important factor' which should be considered by the trial court 'is whether any delay in moving for intervention will prejudice the existing parties to the case.' 2 Barron & Holtzoff, *supra*, § 594, at 366." *Smith Petroleum Service, Inc. v. Monsanto Chemical Co.*, 420 F.2d 1103, 1115 (5th Cir. 1970).

[77]*Smith Petroleum Service, Inc. v. Monsanto Chemical Co., supra; United States v. Blue Chip Stamp Company*, 272 F.Supp. 432, 435 (C.D. Calif. 1967); and *Basle Theatres, Inc. v. Warner Bros. Pictures Dist. Corp.*, 24 F.R.D. 476 (W.D. Pa. 1959).

[78]A. 484, Footnote 2; R. 449, Footnote 2. (See also, Interveners' Amended Complaint, A. 503; R. 441).

[79]A. 347-48; R. 349, 350-51; *State of Utah v. American Pipe and Construction Co., et al.*, 49 F.R.D. 17, 18-19 (C.D. Cal. 1969).

had already been exhausted by prior class actions.[80] Nevertheless, Respondents made no motion to intervene till more than six months after the statute of limitations ran on May 24, 1969, and after the Court's ruling in December 1969 concerning the class action. The foregoing facts establish that the attempted intervention does not meet the requirement of timely application as spelled out in Rule 24(b). Moreover, Respondents are guilty of the ultimate failure to meet the requirement of timely intervention in that they deferred their motion to intervene for approximately six months after May 24, 1969, the date on which the period of limitations pursuant to Section 5(b) of the Clayton Act finally ran. It follows that the motion to intervene was not timely as a matter of law.

IV.

Conclusion.

The decision of the Ninth Circuit utilized the Federal Rules to abrogate a congressional enacted statute of limitations and thereby deprive defendants of important substantive rights. The statute of limitations evidences a congressional policy favoring repose. Such a policy has been deemed socially desirable in determining a termination point for litigation and is based upon a belief that it is undesirable to have potential litigation forever open. This decision in favor of repose also is designed to insure fairness to defendants.[81]

This policy is of particular importance in the antitrust area because of the protracted and complex nature of antitrust proceedings. It is evident that, in establishing a four-year statute of limitations for anti-

[80]A. 354; R. 356-57; 49 F.R.D. 17, 21.
[81]A. 464-67, 475-81; R. 544-49, 566-79.

trust actions, Congress intended to further the policy of fairness and to promote prompt adjudications as well as settlements. Section 5(b)'s design to promote both settlement and fairness to defendants, as well as to promote timely private enforcement of the antitrust laws, is evidenced by the requirement that "whenever the running of the statute of limitations in respect of a cause of action arising under Section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."[82] The Court of Appeals legislated an exception to the statute of repose by a fiction which added another chapter to the procedural excesses used by some courts under Rule 23 to abridge rights of defendants.

By the simple expedient of alleging the existence of a class pursuant to Rule 23, F.R.Civ.P., a plaintiff can, under the Ninth Circuit's decision, toll the statute of limitations governing claims of would-be class members for such period of time as is required for the

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[82]15 U.S.C. § 16(b). *See also,* H. R. Rep. No. 422, April 1955, 84th Cong. 1st Sess. 2 (1955), which states as follows:

> "It further provides that while the period in which to bring a private treble damage action shall in no case be less than 4 years, nevertheless, in instances where a private suit is tolled because of the pendency of a Government proceeding private treble damage actions must be instituted within 1 year after the termination of the Government's case if, at the end of such period, 4 years or more shall have elapsed since the cause of action accrued. *This requirement is designed to prevent interminable delay and congestion of court calendars as well as encouraging the prompt adjudication of private damage suits.*" (Emphasis added).

District Court to determine that the action cannot be maintained as a class action. Upon a determination by the District Court that there is not a proper class action, members of the non-class are free to bring separate actions of their own or to move to intervene in the original action. Assuming, for example, that the applicable statute of limitations would have run one month after the filing of the class action, under the Ninth Circuit's decision, the would-be class members of the non-class have a month following the final negative determination regarding the class action in which to file their complaints or motions, even though a year or more may have passed since the original complaint was filed.

It is respectfully submitted that the decision of the Court of Appeals is clearly erroneous because it negates the policy of repose underlying Section 5(b) of the Clayton Act and subverts the procedural aspects of Rules 23 and 24, F.R.Civ.P. Clearly the Court of Appeals was not justified in "nullifying or watering down any of the procedural safeguards established * * * by congressional mandate, or by the Federal Rules of Civil Procedure, including amended Rule 23 * * *."[83]

It follows that this Court should vacate the judgment of the Court of Appeals dated January 31, 1973, which reversed the order of the District Court denying Respondents' intervention pursuant to Rule 24(b),

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[83] *Eisen v. Carlisle*, ATRR No. 62, 5/8/73, F-1-F-4 (2nd Cir. Op. May 1, 1973).

F.R.Civ.P. It is respectfully submitted that this Court should issue its mandate directing reinstatement of the aforesaid order of the District Court.

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IN THE

Supreme Court of the United States

October Term, 1972

No. 72-1195

AMERICAN PIPE AND CONSTRUCTION CO., SMITH SCOTT, INC., UNITED CONCRETE PIPE COMPANY, KAISER STEEL CORPORATION, UNITED STATES STEEL CORPORATION, U.S. INDUSTRIES, INC., UTAH CONCRETE PIPE COMPANY, W. R. WHITE COMPANY, all corporations,

Petitioners,

vs.

STATE OF UTAH, a body politic, et al.,

Respondents.

ON CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinions of the district court and the Court of Appeals for the Ninth Circuit are set forth in Brief for Petitioners.

JURISDICTION

The jurisdiction of the Court is set forth in Brief for Petitioners.

QUESTION PRESENTED

Whether an action is "commenced" within the meaning of §5(b) of the Clayton Act for purported members of a Sherman Act § 1 class action when the action is filed timely but denied class action status after the date the limitations run?

STATEMENT

The decision of the United States Court of Appeals for the Ninth Circuit is inextricably tied to the peculiar history of Utah's class action and the subsequent applications for intervention filed by Respondent. Much of the procedural history is set forth in the Brief for Petitioners. However, since this is a case of first impression and since the Ninth Circuit carefully restricted its opinion to the facts, it is important to state fully the facts which bring this case before the Court.

On May 13, 1969, the State of Utah filed a complaint in the United States District Court for the District of Utah.[1] The complaint alleges violations of § 1 of the Sherman Antitrust Act[2] and seeks treble damages and injunctive relief arising out of the purchase of concrete and steel pipe. The State of Utah brought the action on behalf of itself and all of its lesser governmental entities who were end users of pipe acquired from the defendants, co-conspirators and others.[3]

In order to give proper perspective to the issues presented for review, it is necessary to briefly recount the chronological history of the federal government's proceedings involving concrete and steel pipe in the Western area. On March 10, 1964, a United

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[1] A. 313.

[2] 15 U.S.C. § 1.

[3] The class alleged in the complaint was also broad enough to include all other states in the "Western Area" as therein defined, which had not previously filed a similar action, including Wyoming, Nevada and Idaho, and including their lesser governmental entities (A. 313, 314, 317).

States Grand Jury in the Southern District of California returned five indictments, each of which named certain individual defendants and two or more corporate defendants, petitioners in the instant case, with the exception of Utah Concrete Pipe Company and W. R. White Company.[4] Each of the indictments charged the defendants named therein with combining and conspiring together in restraint of interstate trade in a specific product line of steel and/or concrete pipe in violation of § 1 of the Sherman Act, in that they submitted collusive and rigged bids for the sale of such pipe and allocated and divided business among themselves. Pleas of *nolo contendere* were accepted by the court on June 19, 1964.[5] Subsequently, the United States filed five civil actions against various of the same corporate defendants. The civil complaints were based on facts uncovered by the Government in preparing its criminal indictments.[6] On October 28, 1964, the Government, seeking to restrain the defendants from continuing violations of § 1 of the Sherman Act[7] amended each of its five complaints by adding a new count pursuant to § 4 of the Sherman Act.[8]

On December 8, 1967, each of the defendants, with the exception of American Pipe and Construction Company, entered into consent decrees in each of the government civil cases in which they were respectively named as defendants.[9] On May 24, 1968, a consent judgment was entered against American Pipe and Construction Company in each of the three government cases in which it had been named as a defendant.[10]

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[4] A. 11, 19, 26, 36, 45.
[5] A. 52—71.
[6] A. 72, 86, 99, 113, 127.
[7] A. 140 158, 176, 195, 214.
[8] 15 U.S.C. § 4.
[9] A. 232, 242, 252, 263, 274.
[10] A. 284, 294, 303.

The instant class action, alleging respondents to be members of the class, was commenced on May 13, 1969, eleven days before the suspension period provided by § 5(b) of the Clayton Act[11] would have expired.[12] On August 28, 1969, pursuant to a motion of a majority of the petitioners, the Judicial Panel on Multidistrict Litigation transferred the Utah case to the Central District of California for assignment to Judge Martin Pence, Chief Judge of the District of Hawaii, for coordinated or consolidated pretrial proceedings, pursuant to 28 U.S.C. §1407.[13] Judge Pence previously presided over approximately 100 civil actions involving about 350 plaintiffs, all arising out of the government proceedings and known as the "West Coast Pipe Cases."[14]

On November 14, 1969, the petitioners moved for an order determining that the action should not be maintained as a class action.[15] The court made a negative determination of the class action, and in so doing stated:

> In any event, the court can but conclude that the number of public entities in Utah, Wyoming, Nevada and Idaho who might have been injured by the alleged conspiracy would not possibly exceed the 350 cases heretofore filed by end users in the other states of the 'Western Area.' From prior actual experience in like cases involving the same alleged conspiracy, this court could not find that number so numerous that joinder of all members was impracticable, nor can it conclude that a class action here would achieve economies of time, effort and expenses or promote any more uniformity of decision than the joinder method heretofore proved successful. To the contrary, the fact of *joinder and intervention has made the de-*

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[11] 15 U.S.C. § 16(b).

[12] *See* Maricopa County v. American Pipe & Constr. Co., 303 F. Supp. 77 (D. Ariz. 1969, *aff'd per curiam*, 431 F.2d 1145 (9th Cir. 1970), *cert. denied*, 401 U.S. 937 (1971).

[13] *In re* West of the Rockies Concrete Pipe Antitrust Cases, 303 F. Supp. 507, 508 (J.P.M.L. 1969).

[14] A. 346, 348; Utah v. American Pipe & Constr. Co., 49 F.R.D. 17, 18-19 (C.D. Calif. 1969).

[15] A. 341.

> *termination of actual parties plaintiffs and defendants, as well as the percentage of damage determination, much simpler, easier and more practicable than would have been any class action procedure under the present Rule* 23(b)(3). (Emphasis added.)[16]

On December 4, 1969, the court entered its order stating that the class action could not be maintained.[17] Eight days later, on December 12, 1969, more than 60 lesser governmental entities of the State of Utah, including respondents, members of the abortive class, filed motions to intervene as plaintiffs.[18] As indicated by the affidavits filed in support of their motion for intervention, the respondents had purchased substantial amounts of said pipe from the petitioners, co-conspirators and others.[19] While several of the respondents were aware of the class action before it was filed,[20] the majority of the respondents could not be said to have knowingly relied upon the State's action. The State of Utah, however, did rely upon the class action as a vehicle through which the claims of all its lesser governmental entities could be presented to the court; and, upon the negative determination of the class, the State took steps to notify these entities which resulted in the motions to intervene.[21]

Following a hearing, the court on March 30, 1970, rendered its opinion on the applications to intervene.[22] In its opinion the court indicated that "the problem underlying all of the motions is that of the bar of the statute of limitations to the petitioners'

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[16] A. 353; Utah v. American Pipe & Constr. Co., 49 F.R.D. 17, 21 (C.D. Calif. 1969).

[17] A. 344.

[18] A. 355-360. A supplemental motion to intervene was filed on December 29, 1969, for six additional applicants for intervention, A. 386.

[19] A. 388-428.

[20] A. 412, 413, 416, 418, 419.

[21] A. 430-34, 471-72. One may presume that "class members situated in a given state would prefer to be represented by the attorney general of that jurisdiction." Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 484 (N.D. Ill. 1969).

[22] A. 482; Utah v. American Pipe & Constr. Co., 50 F.R.D. 99 (C.D. Calif. 1970).

complaints."[23] The court then stated that Rule 23 of the Federal Rules of Civil Procedure could not toll the antitrust statutes of limitation by any theory of relation back. Reasoning that §§ 4B[24] and 5(b)[25] of the Clayton Act were substantive in nature, the court concluded:

> . . . that within the statutorily created antitrust universe Section 5(b) cannot be retolled by any Rule to permit relation back to their several causes of action by intervenors attempting to intervene in *either class or non-class actions* filed for violation of the antitrust laws, after the tolling period of Section 5(b) has ended. (Emphasis added.)[26]

The court denied leave to intervene *with relation back* for the purposes of the statute of limitations.[27] The court nevertheless indicated that the respondents' motions to intervene would be granted as to the claims alleged for the four years preceding December 12, 1969, *i.e.*, the period not then barred by § 4B of the Clayton Act.[28]

In order to secure a final order which could be appealed, respondents amended paragraph 24 of their proposed complaint in intervention so as to limit their allegations of conspiracy to a date four years preceding the time of filing.[29] Whereupon, on July 8, 1970, the court entered its findings of fact, conclusions of law and order on the motions to intervene.[30] The court found that the tolling of the statute of limitations, based upon the government proceedings, ceased on May 24, 1969, and that the filing of a class action by the State of Utah, did not bring the

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[23] A. [illegible]3-84; 50 F.R.D. at 101.
[24] 15 U.S.C. § 15b.
[25] 15 U.S.C. § 16(b).
[26] A. 498; 50 F.R.D. at 108.
[27] A. 499; 50 F.R.D. at 108.
[28] A. 502; 50 F.R.D. at 110.
[29] A. 503.
[30] A. 505.

intervenors within the period of limitation. Insofar as any of the proposed causes of action by respondents were based upon the government actions, the court held the same were barred by the applicable statute of limitations. The motions to intervene were denied.

Respondents appealed the trial court's denial of their motions to intervene to the United States Court of Appeals for the Ninth Circuit. In an opinion entered December 11, 1972, the Court of Appeals reversed the District Court.[31] A petition for rehearing was denied,[32] but the earlier opinion was withdrawn and a new opinion entered on January 31, 1973.[33] The Court of Appeals noted that the denial of the class was based on the trial court's conclusion that the suit could best be handled through joinder of the claimants and that the class was not denied for failure to state a claim on behalf of its alleged members nor for lack of standing or for reasons or bad faith or frivolity. The Court of Appeals held that in such circumstances "as to members of the class Utah purported to represent and whose claims it tendered to the court, suit was actually commenced by Utah's filing. The claims of appellants were then before the court and the only question was as to the manner in which they would be entertained on the merits. The requirements of Section 5(b) were then met."[34]

The matter was ordered remanded to the District Court with instructions that the order be vacated and for furher proceedings upon the motions.[35]

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[31] State of Utah v. American Pipe & Constr. Co., Petitioners' Brief for Certiorari, App. E.

[32] Petitioners' Brief for Certiorari, App. A.

[33] Petitioners' Brief for Cert. App. D.; 473 F.2d 580.

[34] Petitioners' Brief for Cert., App. D at 37-38; 473 F.2d at 584.

[35] Petitioners' Brief for Cert., App. D at 39; 473 F.2d at 584.

SUMMARY OF ARGUMENT

The State of Utah filed a Sherman Act § 1 class action in an attempt to represent not only its own interests but those of its lesser governmental bodies. The trial court determined that the class action could not be maintained since it felt the claims of the alleged members could better be handled through joinder or intervention. The class action complaint was filed timely but denied class action status by the trial court after the limitations period set forth in §5(b) of the Clayton Act had run. Eight days after the entry of the trial court's negative order on the class action, respondents, some 60 members of the abortive class, filed motions to intervene. The trial court then held that the applications for intervention could not be granted since the proposed complaints alleged causes of action which were barred by the statute of limitations. The Court of Appeals for the Ninth Circuit correctly reversed the trial court, holding that under the facts the action was "commenced" within the meaning of § 5(b) and the rights of the absentee plaintiffs were not barred by the statute of limitations.

The Ninth Circuit's decision is consistent with those of other courts considering the application of § 5(b) to an absentee member of a class. This is true both as to cases dealing with amended Rule 23 and as to those involving the effect of spurious class actions under old Rule 23. The Ninth Circuit had no doubt that respondents' claims would satisfy § 5(b) if the action had proceeded as a class action. It held that the rule was the same in the instant case even though the class action was negatively determined by the trial court.

The Ninth Circuit's decision is carefully restricted to the facts of the case, of which the most important facts concern the reasons the trial court determined that the class action could not

be maintained. Maintenance of the class action was denied because the trial court felt that the class action device was inferior to other available methods for the fair and efficient adjudication of the controversy. The Court of Appeals observed that maintenance of the class action was not denied for failure to state a claim on behalf of the members nor for lack of standing of the representative, nor for reasons of bad faith or frivolity. It was denied because the trial court felt that the claims could more efficiently be entertained through joinder of the claimants rather than by class treatment. Under these circumstances, the Ninth Circuit held that as to the members which Utah purported to represent and whose claims it tendered to the court, suit was actually commenced by Utah's filing. Respondents' claims were then before the court, and the only question was as to the manner in which they should be entertained on the merits.

The effect of a negative determination of a class action insofar as a statute of limitations is concerned must be decided by reference to the laws governing the specific statute as they apply in a particular context. The decision of the Ninth Circuit is consistent with the plain meaning of § 5(b) and the liberal construction which this Court has placed upon the antitrust statute of limitations. It is equally consistent with the purpose and intent of Rule 23. The commencement of the Sherman Act § 1 class action halts the running of the statute of limitations as against all members of the alleged class. If it is subsequently determined by a court that the case cannot be maintained as a class action pursuant to Rule 23, the purported members should be granted reasonable time within which to intervene. This is particularly so when, as in the instant case, the reason for the trial court's negative determination under Rule 23 is its preference to handle the matter through intervention.

This case does not involve a question of abuse of discretion. From its opinion it is clear that the trial court was prepared to allow the respondents to intervene so as to allege claims which, in its mind, were not barred by the statute of limitations. The trial court did not deny intervention as an exercise of its discretion. Rather, intervention was denied because of the court's holding as to the statute of limitations. The decision of the Court of Appeals represents a wise adjudication based upon proper policy considerations. It recognized the inconsistency in the decisions of the trial court, and, in effect, held that the trial court could not deny class action status to the case and then refuse to grant timely applications for intervention which the court itself had invited. A contrary decision would put § 5(b) entirely within the discretion of the trial judge. The trial court could, through a discretionary determination of whether the suit had been commenced or not render the statute of limitations applicable or not. The Ninth Circuit felt that such questions should be resolved by rule of law rather than exercise of discretion. The Court of Appeals correctly held that members of a class in respondents' position had satisfied the statute when the class action was filed. If the class had succeeded, there could be no question that respondents were properly before the court within the statute of limitations. When it failed, because the trial court in its discretion wanted the claims presented in a different form of proceeding, it could not be said that the respondents were then never before the court but only that they were out of court again in exactly the same position as when the class action was filed. The decision of the Court of Appeals is correct and should be affirmed.

ARGUMENT

I

RESPONDENTS ARE ENTITLED TO THE BENEFIT OF THE DATE OF THE COMMENCEMENT OF THE CLASS ACTION FOR PURPOSES OF THE STATUTE OF LIMITATIONS.

The question before the Court is whether intervenors who are members of an abortive class are entitled to the benefits of the date of the commencement of a Sherman Act § 1 class action for purposes of the statute of limitations. It is a question of first impression involving the relationship between § 5(b) of the Clayton Act and Rule 23 of the Federal Rules of Civil Procedure. Specifically the court must decide whether an action is "commenced" within the meaning of § 5(b) as to absentee plaintiffs when a class action complaint is filed timely but denied class action status by the trial court after the limitations period has run.[36]

Petitioners lament the decision of the Ninth Circuit as an abridgement, enlargement or modification of the substantive barring provisions of § 5(b). They go to great lengths to demonstrate what they conceive to be the illogic of the Ninth Circuit opinion. In this regard, petitioners erroneously construe the facts of this case. Petitioners have argumentatively suggested many of the difficulties inherent in the application of an arbitrary rule in this area. However, law is not an abstract proposition; it grows and develops through a process of applying legal theories

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[36] The proviso of § 5(b) reads as follows:

Provided, however, That whenever the running of the statute of limitations in respect of a cause of action arising under section 15 of this title is suspended hereunder, any action to enforce such cause of action shall be forever barred unless *commenced* either within the period of suspension or within four years after the cause of action accrued. (Emphasis added.) 15 U.S.C. § 16(b) (§ 5(b) of the Clayton Act.)

to the operative facts of individual cases. It is the sum total of judicial attempts to reach wise and just decisions in the light of the circumstances of particular cases.[37]

In order to reach a wise and just decision in the instant case, it is necessary to consider the facts carefully, and in light of the circumstances weigh competing principles in order to give effect to the broad policy considerations upon which they are based. On one hand we have a statute wherein Congress determined that whenever the running of the statute of limitations in any case such as this is suspended by prior governmental action, any action shall be barred unless commenced either within the period of suspension or within four years after the cause of action accrued. On the other hand we have Rule 23 of the Federal Rules of Civil Procedure, a rule designated to facilitate adjudication of numerous claims with judicial economy. It is then necessary to construe § 5(b) vis-a-vis Rule 23 in the light of the facts of this action.

In the instant case the class action complaint, alleging violations that accrued more than four years previously, was filed 11 days before the suspension period by § 5(b) would have expired. There is no question that the complaint was timely insofar as the State of Utah, the named plaintiff and representative party, is concerned. The State's case is still pending before the trial court in the course of discovery. The question before this Court

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[37] As Justice Holmes observed:

> It is something to show that the consistency of the system requires a particular result, but it is not all. *The life of the law has not been logic: it has been Experience.* The felt necessities of the time, the prevalent moral and political theories, institutions of public policies, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed . . . *The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient;* but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past. (Emphasis added.) Holmes, The Common Law 1 (1881).

involves the rights of the respondents,[38] purported members of that class action.

A. Rule 23 — The Rights of Class Members.

Rule 23 requires that any judgment in a class action, whether or not favorable to the class, shall include all of those plaintiffs whom the court finds to be members of the class.[39] The underlying policy of the rule is to provide a judicial vehicle to handle claims so numerous that joinder is impracticable.

If a class aciton is filed and subsequently maintained as such, the rights of all members not opting out are protected. As indicated by the Court of Appeals in the instant case: "If the action had proceeded as a class action, we have no doubt that [respondents'] claims would satisfy Section 5(b)."[40] The Ninth Circuit held that the rule was the same in the instant case, even though the class action was negatively determined by the trial court.[41]

This is consistent with the decisions of other courts considering the application of § 5(b) to an absentee member of a class. In *Minnesota v. United States Steel Corp.*,[42] the court stated as follows:

> The court holds and orders that all of these suits may be maintained as class actions and that the filing of these actions tolls the statute of limitations as to absentee plaintiffs, or, put another way, those eligible entities who chose [sic] to join the class in the manner hereinafter prescribed

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[38] These persons may be described as "absentee plaintiffs," "members of an abortive class," or "former members of a class action which the trial court determined could not be maintained as such."

[39] F. R. Civ. P. 23(c) (3).

[40] Petitioners' Brief for Certiorari, App. D at 36; 473 F.2d 583.

[41] See *Esplin v. Hirschi*, 402 F.2d 54 (10th Cir. 1968).

[42] 44 F.R.D. 559 (D. Minn. 1968).

> may date themselves back for purposes of the statute of limitations to the date of the filing of the class action which they join.[43]

The Ninth Circuit correctly held the rule to be the same even though the class action is negatively determined.

Section 4B and the present form of § 5(b) were added to the Clayton Act in 1955. Six years later the Court of Appeals for the Tenth Circuit decided *Union Carbide & Carbon Corp. v. Nisley.*[44] That case involved a question concerning the application of § 5(b) to the commencement of a spurious class action under the old Rule 23. The defendants there, as in the instant case, argued, *inter alia,* that the statute of limitations had run as to class members who were not parties actually before the court. They contended that the filing of the spurious class action served to toll the statute only in favor of the named plaintiffs and that each class member had to appear and assert his claim before the expiration to the statutory period. The court had already determined that the unnamed plaintiffs could intervene after rendition of the verdict in order to claim the benefits of a favorable judgment.[45] In answer to the statute of limitations contention, Judge Murrah stated:

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[43] The court in the *Minnesota* case based its conclusion upon these considerations:

> (1) the only reported decision found to date under the new Rule 23 held the statutory period tolled under very similar circumstances; (2) the vast majority of pre-amendment Rule 23 cases established the propriety of tolling in 'spurious' class actions; and (3) policy considerations inherent in Section 5(b), plus the changes wrought by new Rule 23(b)(3), demand that tolling be permitted. 44 F.R.D. at 565.

[44] 300 F.2d 561 (10th Cir. 1961), *cert. dismissed, sub nom.,* Wade v. Union Carbide & Carbon Corp., 371 U.S. 801 (1962).

[45] The spurious class action authorities were divided as to the particular point in the action when intervention was to be cut off. In *York v. Guaranty Trust Co.,* 143 F.2d 503 (2d Cir. 1944 *rev'd on other grounds,* 326 U.S. 99 (1945), Judge Frank suggested that spurious class members be allowed to intervene even after the matter had been decided and for a reasonable time prior to the entry of a final judgment. This theory was followed by the Tenth Circuit in *Union Carbide & Carbon Corp. v. Nisley,* 300 F.2d 561, 589 (10th Cir. 1962).

> If, however, the unnamed plaintiffs are to be accorded the benefits of the judgment, it must be said that the running of the statute of limitations is tolled by the *commencement* of the suit. [Cases cited] If a class action is maintainable as such, it is incongruous to say that the absent members, who are represented by those present, may not rely upon the commencement of the action by their brethren to toll the running of the statute. This would only serve to 'convert the rule into a trap' for those who have expeditiously allowed their rights to be maintained by a class action.[46] (Emphasis added.)

The respondents, as members of an abortive class, are in a position similar to absentee plaintiffs who sought to intervene in spurious class actions under old Rule 23. Such a proceeding was really not a class action at all.[47] The decree in a spurious class action was not binding on the entire class, but merely a procedural device, an invitation for permissive joinder. If the filing of a spurious class action under old Rule 23 "commenced" an action as to the unnamed and absent plaintiffs within the meaning of § 5(b),[48] the filing of the class action complaint in the instant case under new Rule 23, which makes the judgment binding on all members, should certainly suffice.[49]

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[46] 300 F.2d at 589-90.

[47] See 3B J. Moore, Federal Practice, ¶23.11(3) at 23-2851 to 2857 (2nd ed. 1969).

[48] Prior to the amendment of Rule 23 of the Federal Rules of Civil Procedure in 1966, a majority of the courts passing upon the question concluded that the commencement of a spurious class action tolled the applicable statute of limitations for the benefit of absentee plaintiffs. *See e.g.*, Escot v. Barchris Construction Corp., 340 F.2d 731 (2d Cir. 1965), *cert. denied*, 382 U.S. 814 (1966) (securities); Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561 (10th Cir. 1961), *cert. dismissed, sub nom.*, Wade v. Union Carbide & Carbon Corp., 371 U.S. 801 (1962) (antitrust); *see also* 3B J. Moore, *supra* note 47. Also persuasive is the rationale of the Fair Labor Standards Act cases which allowed intervention to relate back to the filing date on the theory that there was a "community of interest" shown by the claims. *See e.g.*, Culver v. Bell & Loffland, 146 F.2d 29 (9th Cir. 1945); Kam Koon Won v. Black, 75 F. Supp. 553 (D. Hawaii 1948); Wright v. United States Rubber Co., 69 F. Supp. 621 (S.D. Iowa 1946).

[49] Under amended Rule 23, the members of the class who do not exclude themselves are bound by res judicata. The cases involving statute of limitations questions and the new rule thus far have involved situations where the class action has been upheld and the court has determined that the suit could be maintained as such. Under these circumstances, the commencement of a class action has been

The Tenth Circuit has already indicated that the rule in that circuit is the same under amended Rule 23; that is, the commencement of a class action halts the running of the statute of limitations as against all members of the class.[80] In *Esplin v. Hirschi,* the Tenth Circuit reversed the trial court's holding that a securities case could not be maintained as a class action. In so doing, Judge Hill stated:

> In holding that the class action should have been allowed, it becomes necessary to comment briefly on the effect of this upon the statute of limitations issue. This court has held that the commencement of a spurious class action halts the running of the statute as against all members of the class. Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 590 (10th Cir. 1962). *The same will be true under newly amended Rule 23.* Hence, the rights of the class members are to be determined as if the class action had been allowed instead of being incorrectly terminated below. *This means that the status of class members is to be determined by relation back to the date of the initiation of this suit . . .*[81] (Emphasis added.)

The Ninth Circuit's holding is consistent with the policy underlying Rule 23. If a class action is maintained, then the rule provides for notice to the class members.[82] Those members, however, need never plead as individuals since any judgment will include all members "who do not request exclusion."[83] In other

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held to toll the statute of limitations as to absentee plaintiffs. Minnesota v. United States Steel Corp., 44 F.R.D. 559, 565, 573 (D. Minn. 1968); Philadelphia Elec. Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D. Pa. 1967). *See* 3B J. Moore, *supra* note 47, ¶23.90(3).

[80] Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968).

[81] 402 F.2d at 101, n. 14.

[82] Rule 23(c) (1) provides:
"As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

[83] F. R. Civ. P. 23 (c) (3).

words a passive class member previously unaware of the action is nevertheless protected by the filing of the class action and will be bound by any judgment in the case unless he specifically requests exclusion from the class.

The commencement of the class action "creates" a class action which exists until and unless the court determines it cannot be so maintained.[54] The trial court's notion in the instant case that a negative determination wipes away the class action as if it never existed[55] is a confusing and needless fiction. At the time the complaint was filed there was a bona fide class. The State of Utah was attempting to represent both itself and all of its lesser governmental bodies. It is difficult to imagine a better example of a proper class. The fact that some 60 members of the "nonclass" applied to the court for intervention only eight days after the negative determination indicates that there was a very real class of absent plaintiffs in need of representation. Under Rule 23(e) the action could not have been dismissed or compromised without approval of the court and notice to the members of the entry of a negative order. The fact is, the class action did exist. It may exist again upon amendment by the trial court or the transferor court (the District of Utah) or upon a contrary ruling by an appellate court.[56]

Moreover, the defendants in the instant case are not prejudiced. The filing of the action as a class action gave them the same notice that other parties plaintiff would be involved[57] as is given to defendants opposing a maintained class of plaintiffs. Accordingly, the decision of the Court of Appeals in this case should not be considered apart from those cases allowing inter-

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[54] F. R. Civ. P. 23(e).

[55] A. 489-99, 50 F.R.D. at 108.

[56] *See* Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968).

[57] *See* Minnesota v. United States Steel Corp., 44 F.R.D. 559, 575 (D. Minn. 1968); Culver v. Bell & Loffland, 146 F.2d 29 (9th Cir. 1945).

vention by members of a maintained class after the statute of limitations has run. The only criterion under Rule 23 that distinguishes respondents from members of a maintained class is that their number was thought to be so few as to make joinder and intervention a practicable method of litigating their claims.[58] The trial court made clear in its opinion that respondents met the prerequisites of Rule 23 that go to the relationship between class members and defendants or the representative parties.[59] The only "deficiency" under Rule 23, then, did not pertain to provisions of the Rule that might affect the substantive rights of the defendants. With respect to the defendants, the applicants for intervention stood in exactly the same position as would members of a maintained class. It is only in terms of the procedure desired by the court that the applicants differed from a maintainable class.

Viewed in the perspective of its subsequent denial of respondents' motions to intervene, the trial court's ruling in regard to Rule 23 served to "convert the rule into a trap" for respondents.[60] To compel the members of a class to determine *ab initio* whether the court at some later date might determine that the class action could not be mainained would impose an impossible burden upon them. Such an interpretation would be contrary to the strong antitrust policy favoring civil recovery by damaged parties from proven violations of the antitrust laws[61] and the judicial policy favoring the maintenance of class actions in appropriate cases.[62] The running of the statute should not be

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[58] F. R. Civ. P. 23(a) (1).

[59] F. R. Civ. P. 23(a) (2), (3) and (4); *see* A. 350-53; 49 F.R.D. at 20-21.

[60] Union Carbide & Carbon Corp. v. Nisley, 300 F.2d 561, 590 (10th Cir. 1962); York v. Guaranty Trust Co., 143 F.2d 503, 529 (2d Cir. 1944), *rev'd. on other grounds* 326 U.S. 99 (1945).

[61] *Cf.* Deckert v. Independence Shares Corp., 39 F. Supp. 592, 597 (E. D. Pa. 1941).

[62] *See* Dolgow v. Anderson, 43 F.R.D. 472 (E.D.N.Y. 1968); Eisen v. Carlisle & Jacquelin, 391 F.2d 555 (2d Cir. 1968); Esplin v. Hirschi, 402 F.2d 94 (10th Cir. 1968); Illinois v. Harper & Row Publishers, Inc., 301 F. Supp. 484, 490 (N.D. Ill. 1969).

made to turn on whether the representative plaintiff is successful is convincing the court that the class action should be maintained.[63]

B. *The Reasons for Denying Class Action Status to a Case Must Be Considered.*

Perhaps the most important part of the instant case concerns the reasons the trial court determined that the class action could not be maintained. As the Ninth Circuit observed, the maintenance of the class action was denied because the trial court felt that the class action device was inferior to other available methods for the fair and efficient adjudication of the controversy. The Court of Appeals stated as follows:

> Maintenance of the class action was denied not for failure of the complaint to state a claim on behalf of the members of the class (the court recognized the probability of common issues of law and fact respecting the underlying conspiracy), not for lack of standing of the representative, or for reasons of bad faith or frivolity. It was denied because, considering the size of the class and the nature of the claims of its members, it was felt that those claims could more efficiently be entertained through joinder of the claimants rather than by class treatment.
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> Under these circumstances, we hold that as to members of the class Utah purported to represent, and whose claims it tendered to the court, suit was actually commenced by Utah's filing. The claims of appellants were then before the court and the only question was as to the manner in which they should be entertained on the merits. The requirements of §5(b) were then met.[64]

In its opinion the trial court indicated that the class alleged by Utah could not possibly exceed the 350 cases which the court had previously disposed of through joinder. Judge Pence could not conclude that a class action in the instant case would achieve

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[63] *Cf.* Leh v. General Petroleum Corp., 382 U.S. 54, 65 (1965).

[64] Petitioners' Brief for Certiorari, App. D at 37-38; 473 F.2d at 584.

economics of time, effort and expenses or promote any more uniformity of decision than the joinder method which he had utilized in the West Coast Pipe Cases. He stated:

> To the contrary, the fact of joinder and intervention has made the determination of actual parties plaintiffs and defendants, as well as the percentage of damage determination, much simpler, easier and more practicable than would have been any class action procedure under the present Rule 23(b)(3).[65]

The trial court then determined that the action could not be maintained as a class action since the court, as a matter of judicial administration, preferred to handle the claims through joinder of any additional claims. Consistent with these findings, the trial court could not deny the motions to intervene, which it had in fact invited, on grounds that permissive intervention would unduly delay the adjudication of the rights of the original parties. However, the court reached the same result by denying leave to intervene *with relation back* of respondents' proposed actions to May 13, 1969 *because it believed such actions were barred by the statute of limitations.*[66] The trial court acknowledged the respondents as parties before the court as to the claims alleged for the four years preceding December 12, 1969 when the motions to intervene were filed. As to those claims, Judge Pence stated, "This could not now dismiss their complaints."[67]

The Ninth Circuit, in reversing the district court, indicated that it did not lie within the discretionary province of the trial court to deprive respondents of the eleven days balance of time remaining to them under § 5(b). It suggested that if the trial judge, through legal fiction, projects his order denying the class

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[65] A. 353, State of Utah v. American Pipe & Constr. Co., 49 F.R.D. 17, 21 (C. D. Calif. 1969).

[66] A. 498-99, 50 F.R.D. at 108.

[67] A. 502; 50 F.R.D. at 110.

action backward in time to the date the class action was filed, he must fictionally carry backward with it the class members to whom it was directed and the rights they possess. In this connection the Court of Appeals stated as follows:

> Suit having been commenced by a filing of the complaint, members of the class were safely in court and their claims protected against the bar of §5(b) until, by order of the court, they were ejected from the suit. The statute thus was tolled by commencement of suit and did not again commence to run until entry of the order denying class action.[68]

Petitioners criticize this as a rule which will promote great mischiefs in the future. One example suggested is the application of this rule to the factual situation in *Eisen v. Carlisle & Jacquelin*.[69] In *Eisen* over six million odd-lot stock buyers were potential members of the class. The Second Circuit found it impossible to devise a fair method of giving notice to the members, and accordingly, dismissed the action as "unmanageable." In Utah's purported class there was no question that the representative party could notify and otherwise fairly represent the members of the class. Utah's suit was denied class action status not because it was unmanageable, but because it was too manageable — all of its members could be brought before the court by joinder.

To paraphrase the Advisory Committee's comment in its note to subdivision (c) (1) of Rule 23, the effect of a negative determination of a class action insofar as a statute of limitations is concerned must be decided by reference to the laws governing the specific statute as they apply in a particular context.[70] As we

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[68] Petitioners' Brief for Certiorari, App. D. at 39; 473 F.2d at 584.

[69] 1973 Trade Cas. ¶ 74,476 (2d Cir. 1973).

[70] *See* 3B J. Moore, *supra* note 47, ¶23.90(3) at 23.1653. The Advisory Committee briefly considered such a possibility in its note to subdivision (c) (1) of Rule 23. The committee reviewed the wide discretion granted a trial court in connection with giving notice in a class action and stated as follows concerning a negative determination: [This footnote continued on next page]

have stated, the reasons for determining that the class action should not be maintained are important. The nature of the class and the composition of its members, vis-a-vis the representative party are important. The time frame within which motions to intervene are filed is important. Respondents filed their motions to intervene as plaintiffs eight days after the trial court entered its order that the action should not be maintained as a class action. Certainly said motions were filed within a reasonable time after the court's order and were timely for purposes of intervention. As applied to the instant case, the Ninth Circuit's rule is reasonable and represents the logical articulation of a just decision under the circumstances.

Petitioners' fears concerning the application of such a rule to cases such as *Eisen* are also allayed by reference to Rule 24(b) of the Federal Rules of Civil Procedure and the factors the court must consider in exercising its discretion. Certainly six million intervenors could unduly delay or prejudice the adjudication of the rights of the original parties. In the instant case, however, the trial court effectively exercised his discretion in favor of the intervention *which he had invited* and indicated that permissive intervention would be granted except for claims arising during the period he deemed barred by the statute of limitations.

C. *The Particular Statute of Limitations and Its Underlying Policy Must Be Considered.*

Another important consideration in determining the effect of the trial court's decision under Rule 23 is the particular statute

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A negative determination means that the action should be stripped of its character as a class action. See subdivision (d) (4). Although an action thus becomes a nonclass action, the court may still be receptive to interventions before the decision on the merits so that the litigation may cover as many interests as can be conveniently handled; the questions whether the intervenors in the nonclass actions shall be permitted to claim 'ancillary' jurisdiction or the benefit of the date of the commencement of the action for purposes of statute of limitations are to be decided by reference to the laws governing jurisdiction and limitations as they apply in particular contexts. *Committee Note to Rule* 23(c) (1), 39 F.R.D. 99, 104 (1966).

of limitations, the context within which it appears, and the policy upon which it is based. In order to avoid the bar of the statute, § 5(b) requires an action to be "commenced" within the period of suspension or within four years after it accrues. The Court of Appeals found no conflict between § 5(b) of the Clayton Act and Rule 23 since it held that the instant lawsuit "was commenced by Utah eleven days before the running of the statute."[71] In other words, under the facts the action was "commenced" within the meaning of § 5(b), and the rights of the absentee plaintiffs were not barred by the statute of limitations. In prior decisions this Court has liberally interpreted § 5(b) of the Clayton Act. In *Leh v. General Petroleum Corp.*,[72] the Court cautioned against "a niggardly construction of the statutory language" of §5(b). Again, in *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*,[73] the Court observed that "In 5(b) Congress meant to assist private litigants in utilizing any benefits they might cull from government antitrust actions." The expanding judicial construction of the antitrust statute of limitations is detailed by Judge Pence in his scholarly opinion in *Maricopa County v. American Pipe & Constr. Co.*[74] In view of the liberal interpretation which this Court has placed upon §5(b), based on the broad policy considerations underlying the Clayton Act,[75] we submit that the decision of the Ninth Circuit in the instant case was clearly correct. The commencement of a Sherman Act §1 class action halts the running

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[71] Petitioners' Brief for Certiorari, App. D, at 36; 473 F.2d at 583.

[72] 382 U.S. 54, 59 (1965).

[73] 381 U.S. 311 (1965).

[74] 303 F. Supp. 77 (D. Ariz. 1969), *aff'd per curiam*, 431 F.2d 1145 (9th Cir. 1970), *cert. denied*, 401 U.S. 937 (1971).

[75] This Court has made it clear that § 5(b) must be interpreted broadly in order to effectuate the belief of Congress "that private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co., 381 U.S. 311, 318 (1965); Leh v. General Petroleum Corp., 382 U.S. 54, 59 (1965).

of the statute of limitations as against all members of the alleged class. If it is subsequently determined by a court that the case cannot be maintained as a class pursuant to Rule 23, the purported members should be granted reasonable time within which to intervene. This is particularly so when, as in the instant case, the reason for the trial court's negative determination under Rule 23 is its preference to handle the matter through joinder and intevention.

D. The Ninth Circuit's Decision Does Not Prejudice Petitioners' Substantive Rights.

In its opinion on the motions to intervene, the trial court indicated a belief that the commencement of a class action under Rule 23 could not have the effect of further extending the tolling period specified by § 5(b) of the Clayton Act.[76] This opinion was based on the belief that defendants in an antitrust case are granted a substantive right by the statute "viz., the right to interpose the bar of limitations to attempted tolling of § 5(b) by Rule 23. . . ."[77] Reasoning that § 5(b) created a ***substantive*** right, and relying on the rationale of *The Harrisburg*,[78] the trial court held that the statute of limitations could not be tolled by judicial interpretation of the *procedural* Rule 23.

This substance-procedure dichotomy as applied by the trial court has been limited by this Court to cases involving conflicts of law. In *Burnett v. New York Central Railroad Co.*,[79] Justice Goldberg stated:

> "The distinction between substantive and procedural statutes of limitations appears to have arisen in cases involving conflicts of laws, see The Harrisburg, 119 U.S.

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[76] A. 497-98; 50 F.R.D. at 108.
[77] A. 497; 50 F.R.D. at 108.
[78] 119 U.S. 199 (1886).
[79] 380 U.S. 424 (1965).

> 199; . . . While the embodiment of a limitation provision in the statute creating the right it modifies might conceivably indicate a legislative intent that the right and limitation be applied together when the right is sued upon in a foreign forum, *the fact that the right and limitation are written into the same statute does not indicate a legislative intent as to whether or when the statute of limitations should be tolled.* Thus the "substantive — procedural" distinction would seem to be of little help in deciding questions of extending the limitation period. See Glus v. Brooklyn Eastern Terminal, 359 U.S. 231. . . .[80] (Emphasis added.)

Justice Goldberg stated further:

> In order to determine congressional intent, we must examine the purposes and policies underlying the limitation provision, the Act itself, and the remedial scheme developed for the enforcement of the rights given by the Act.[81]

The courts dealing with appeals in the electrical cases were met with a similar question concerning § 4B of the Clayton Act.[82] The question in those cases was whether fraudulent concealment tolled the four-year statute of limitations contained in § 4B. The first and most complete opinion was that of the Eighth Circuit in *Kansas City, Missouri v. Federal Pacific Electric Co.*[83] There the court was persuaded that § 4B was a procedural statute. In this regard the court stated:

> We are strongly impressed with the assertion that the statute is procedural. The very fact that the limitation period was added 41 years after the enactment of the Clayton Act is indicative that § 4B was not part of the legislative scheme creating a right.[84]

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[80] *Id.* at 427, n. 2.

[81] *Id.* at 427.

[82] Kansas City, Missouri v. Federal Pac. Elec. Co., 310 F.2d 271 (8th Cir. 1962), *cert. denied,* 371 U.S. 912 (1962); Atlantic City Elec. Co. v. General Elec. Co., 312 F.2d 236 (2d Cir. 1962); Public Service Co. of New Mexico v. General Elec. Co., 315 F.2d 306 (10th Cir. 1963), *cert. denied,* 374 U.S. 809 (1963).

[83] 310 F.2d 271 (8th Cir. 1962), *cert. denied,* 371 U.S. 912 (1962).

[84] *Id.* at 282.

In further support of this position, the court quoted from a discussion on the floor of the House of Representatives as to the effect the statute would have upon pending suits:

> Mr. Murray of Illinois: Then am I correct in assuming that this limitation provided by this amendment is strictly a *procedural* limitation and has nothing to do with substance?
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> Mr. Quigley, a member of the House Judiciary Committee: It was the specific purpose of the committee in reporting this bill to in no way affect the substantive rights of individual litigants. It is simply a *procedural* change and suggested with the thought of setting up a uniform statute of limitations. That is the sole purpose.[85] (Emphasis added.)

Irrespective of the procedural-substantive question, the court in the *Kansas City* case felt that congressional intent, as evidenced by legislative history, required the doctrine of fraudulent concealment to be read into § 4B.[86]

While the procedural-substantive discussion in *Kansas City* pertains to § 4B of the Clayton Act, the same conclusions may be drawn as to § 5(b) since the proviso sentence of that section was added by amendment in 1955, contemporaneous to the enactment of § 4B. To paraphrase the court in *Kansas City*, it is difficult to characterize a proviso added forty-one years after the enactment of the Clayton Act as part of a legislative scheme creating a substantive right. To state that defendants in an antirust case have a substantive right, "viz., the right to interpose the bar of limitations to attempted tolling of §5(b) by Rule 23. ..."[87] is a circuitous means of begging the question. Judge Pence's decision in the instant case is an anachronism. An analytical inquiry

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[85] 310 F.2d at 282-283, *quoting from* 101 Cong. Rec. 5131 (1955).

[86] 310 F.2d at 283.

[87] A. 497, 50 F.R.D. at 108.

as to whether § 5(b) is procedural or substantive does nothing but confuse the question. If members of a valid class have their action commenced when the class action is filed, while members of a failed class are never before the court when the class is denied after the period of suspension has ended, then *either* determination under Rule 23 affects the "substantive" right of the parties. The time after which a defendant is protected by the time bar depends directly on a determination made under the Rules of Civil Procedure. The trial court reached the same result concerning the substantive-procedural dichotomy that it sought to avoid by denying the applications for intervention. It is impossible to avoid such contradictions if the procedure-substance classification is made to bear the burdens that should properly be placed on considerations of policy and fairness. In this case the contradiction is compounded, for in arrogating the statute of limitations to its discretion, the trial court removed a "substantive" right from the certainty of both the statutes and the Rules, and left it to be abridged or enlarged in the discretion of the court.

E. The Purposes and Policy of Rule 23 Must Be Considered.

As the trial court below indicated, its opinion would apply to members of a maintained class. In other words, all members would be required to individually protect their right as against § 5(b) by complying with Rule 8 of the Federal Rules of Civil Procedure.[88] In their brief, petitioners argue that this Court should so limit Rule 23.[89] To reverse the Ninth Circuit and affirm Judge Pence, the Court must be prepared to state that Rule 23 is largely inapplicable and virtually useless in antitrust cases. Since under Rule 23 members are not required to intervene,

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[88] A. 497. 50 F.R.D. at 108. *See* F. R. Civ. P. 8.

[89] Brief for Petitioners at 37-38.

if they do not opt out of the class, they are bound by the judgment whether it is favorable or not.[90] In view of the time usually required for such litigation, it would be rare indeed for an antitrust class action filed within the suspension period provided by § 5(b) to be concluded prior to the time that period runs. There thus develops a direct conflict between Rule 23 and the trial court's rule. If a class member did not opt out, Rule 23 would allow him the benefit of the judgment. However, if during the pendency of the case the statute or tolling provision has run and a class member has not affirmatively intervened, the trial court and the petitioners herein would bar his recovery on the judgment. The holding of the trial court in the instant case was bad law. It thwarted the policy of the Clayton Act and the purpose of Rule 23. Rule 23 was amended specifically to remove any requirement of intervention.[91] The trial court's decision would emasculate that amendment.

To nullify Rule 23 as to the majority of antitrust actions would be a backward step of appalling proportions. It would, in fact, undo much of what has been accomplished procedurally since the confusion engendered by the electrical cases. The Ninth Circuit properly recognized that such a drastic result was not required by the plain meaning of § 5(b) of the Clayton Act, congressional intent or the current trend of judicial decisions, including the interpretations placed upon that section by this Court.[92]

The decision of the Ninth Circuit was correct. The class action in the instant case was *commenced* within the period of suspension provided by § 5(b) of the Clayton Act. In view of

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[90] F. R. Civ. P. 23(c) (2).

[91] *Committee Note to Rule* 23, 39 F.R.D. 98-99, 105-06 (1966).

[92] Petitioners' Brief of Certiorari, App. D. at 3739; 473 F.2d at 583-84.

broad policies underlying the Clayton Act and the liberal interpretation afforded § 5(b) by this Court, the respondents should be entitled to the benefit of the date of the commencement of the class acion insofar as the statute of limitations is concerned.

II

THIS CASE DOES NOT INVOLVE AN ABUSE OF DISCRETION QUESTION.

The Court of Appeals was not faced with an abuse of discretion question. From its opinion it is clear that the lower court was prepared to allow the respondents to intervene so as to allege claims which in its mind were not barred by the statute of limitations; that is, those claims still within the four years provided by § 4B of the Clayton Act:[93]

> As the pleadings now stand, since petitioners have alleged a cause of action for the four years preceding December 12, 1969, when these motions were filed, this court could not now dismiss their complaints. In futuro, it can only rule on problems, discovery, etc., for periods after, as distinguished from prior to December 12, 1964, in the context of the statutory bar for any transactions or claims arising prior thereto. Therefore, as to all parties-plaintiff now before the court, the court's rulings do not with finality dispose of their cases.[94]

The trial court did not deny intervention as an exercise of its discretion; rather, intervention was denied because of the court's holding as to the statute of limitations. The Court of Appeals had no other question before it. The problems of abuse of discretion and possible conflicts arising therefrom are illusory. How-

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[93] 15 U.S.C. § 15b.

[94] A. 502; 50 F.R.D. at 110.

ever, if the trial court had exercised its discretion against the intervention invited by its opinion on the class action,[95] it would most certainly have committed an abuse of discretion.

The question presented to the Court of Appeals was narrower than that presented in appeals attacking denial of intervention for more general reasons. The posture of this case was similar to that of *Brotherhood of Locomotive Firemen & Enginemen v. United States, ex rel. Deavers.*[96]

In refusing to allow intervention in the instant case the trial judge made reference to prejudice which might occur if intervention were allowed..[97] In the context of Rule 24(b),[98] a trial judge ruling on a motion to intervene must consider whether "intervention will unduly delay or prejudice the rights of the original parties."[99] However, in this case the trial judge's reference to prejudice was addressed to the question of whether petitioners were entitled to assert the statute of limitations to bar respondents' motion to intervene. In resolving this question it can hardly be said that the trial judge engaged in an exercise of discretion. First, in reaching his decision he did not

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[95] A. 352-53; 49 F.R.D. at 21.

[96] 183 F.2d 65 (5th Cir. 1950). In *Deavers* the Court of Appeals in a previous opinion in the same case had stated, by way of dictum, that no other parties were necessary to adjudicate the matter at issue. *United States ex rel. Deavers v. Missouri, K. & T. R. Co.*, 171 F.2d 961 (5th Cir.), *cert. denied* 337 U.S. 958 (1949). On remand another party sought to intervene, and upon denial of intervention the case once again reached the Court of Appeals. In reversing the order denying intervention, the court stated:

> Ordinarily, in the absence of an abuse of discretion, no appeal lies from an order denying leave to intervene, but in this instance the court below was clearly disposed to grant the intervention, and only refused to do so because of some of the language used by the writer of the former opinion. In these circumstances, we think the appeal should be granted, and the order denying intervention reversed. The orders appealed from are reversed, and the cause remanded to the district court for further proceedings not inconsistent with this opinion. 183 F.2d at 67.

[97] A. 486; 50 F.R.D. at 102.

[98] F. R. Civ. P. 24(b).

[99] *Id.*

place significant reliance upon facts peculiar to the parties and the subject matter — factors which usually influence a discretionary ruling.[100] Further, it would be an incongruous use of discretion for a trial judge first to deny a class action because of a preference for joinder and then deny joint intervention to members of the class. Without any use of discretion, the trial judge in this case simply formulated a legal theory by which he disposed of the intervention question. He rejected a prior line of cases employing a "balancing of interests" approach to conflicts between the Federal Rules of Civil Procedure and § 5(b)[101] and adopted an interpretation of 28 U.S.C. § 2072 that would bar any consideration of the effect of the class action.[102] The Ninth Circuit properly recognized that the ruling by the district court was not a matter of discretion, but an erroneous postulate of law, and it reversed.

III

THE DECISION OF THE COURT OF APPEALS IS CLEARLY CORRECT AND REPRESENTS A WISE ADJUDICATION BASED UPON PROPER POLICY CONSIDERATIONS AND PRINCIPLES OF DUE PROCESS.

The decision of the Ninth Circuit does justice in an area of confusing and competing policy considerations. The Court of Appeals recognized the patent inconsistency in the decisions of the trial court. The State of Utah filed a class action in an attempt to represent not only its own interests but those of its lesser governmental bodies.[103] The trial court determined that the class action could not be maintained since it felt the action could be better handled through joinder or intervention. Upon the filing

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[100] *See* 3B J. Moore, Federal Practice ¶¶24.10(4), 24.13 (2d Ed. 1969).
[101] A. 486-88; 50 F.R.D. at 102-03.
[102] A. 493-98; 50 F.R.D. at 105-08.
[103] A. 313.

of motions to intervene by the purported class members, the trial court then held that the applications could not be granted since they were barred by the statute of limitations. The trial court's ruling not only exalts form over substance, it denies respondents due process of law. The successive rulings of the trial court have the flavor of a game in which at each turn the respondents are the unfortunate losers. The Court of Appeals viewed these facts clearly and, in effect, held that the trial court could not deny class action status to the case and then refuse to grant timely applications for intervention, which it had invited, ostensibly because the statute of limitations had run in the meantime.

Petitioners argue that the Ninth Circuit's decision will "make the time period of every statute of limitation open ended with no discernible period of repose."[104] In fact, as petitioners themselves make clear, the only indefinite period in such case will be the time required by the trial court to determine whether the suit will be maintained as a class action. If the class fails, its members will have the same interval to file new actions or motions to intervene as remained between the date the class action was brought and the date the statute would have run. This is a discernible period.

Petitioners argue too that the decision will encourage the solicitation of claims by plaintiffs during the time the propriety of the class action is being decided.[105] In many class actions the solicitation of claimants is an abuse that the trial court must control. There is no reason, however, why the methods of control available to the trial court could not be employed during the period it is considering whether the class action should be main-

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[104] Petitioners' Brief for Certiorari at 17.

[105] Brief for Petitioners at 33; Petitioners' Brief for Certiorari at 24.

tained. The order prohibiting both parties from contacting members of the purported class,[106] which petitioners cite as evidence of the problem, would still be available.

Contrary to petitioners' assertions, the instant case is not an example of such abuse. The Attorney General of the State of Utah is its chief legal officer with responsibilities running to the state's inferior governmental entities.[107] He would be remiss in his duties if he failed to apprise these entities of their just claims.

There is no danger that the instant decision will "exacerbate the problem of over use and abuse of the class action device" or "encourage the filing of invalid as well as valid class actions."[108] It bears repeating in reply to these arguments that the decision is limited to cases denying the class action on the basis that the claims can be handled more efficiently through joinder and intervention. As the Circuit Court points out, the number of claimants in a purported class will rarely be so small that as matter of law Rule 23(a)(1) does not apply.[109] If the other requirements

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[106] Wright and Miller, Manual for Complex and Multidistrict Litigation, §§1.61-1.62 (1970 Ed.).

[107] *See* Utah Const. Art. VII, § 18; Utah Code Ann. § 67-5-1 (Repl. Vol. 1968). Commenting on the problem of solicitation as a possible abuse of the class action procedure, Professor Charles Alan Wright has noted that Attorneys General should be exempt from court rules on solicitation because of their constitutional and statutory duties to protect the various government bodies of their respective states.

> A local rule or order [*in re* solicitation] should exempt from its operation (1) communications between an attorney and a client or prospective client who has, on the initiative of the client or prospective client, consulted with, employed or proposed to employ the attorney; and (2) communications occurring in the regular course of business or in the performance of the duties of a public office or agency (such as the Attorney General) which do not have the effect of soliciting representation by counsel or misrepresent the status, purposes or effects of the action or orders therein. Attorneys General are normally regarded as representing the political subdivisions of their own state and should be allowed relatively free discourse, in the public interest, with the Attorneys General and political subdivisions of other states. Wright and Miller, Manual for Complex and Multidistrict Litigation, p. 23 (1973 Ed.)

[108] Petitioners' Brief for Certiorari at 25.

[109] Petitioners' Brief for Certiorari, App. D at 38, n. 9; 473 F.2d at 584, n. 9.

of Rule 23(a) are met, then the problem of abuse and over use of the class action device is difficult to discern.

The chimerical problems of repose, solicitation, and abuse that petitioners see in the Court of Appeals' decision should be contrasted with the real problems that would arise from the district court's rule that claimants in respondents' position are barred. A contrary decision would put § 5(b) entirely within the discretion of the trial judge. If a class action is sustained, then, following the district court's reasoning, each member of it, including an ignorant member "sleeping on his claim," would be before the court with his action commenced before the statute had run. If the class is denied, even on the grounds that its members' claims could more efficiently and practicably be litigated through intervention, then the members of it, including those who stand ready to present their claims as intervenors, were never before the court and their claims are barred. The Court of Appeals concluded that to allow this result "would be to empower the court, through the discretionary determination of whether the suit had been commenced or not, to render the statute of limitations applicable or not, as is seen fit. Considerations of order and certainty dictate that such questions should be resolved by rule of law rather than exercise of discretion."[110]

The Court of Appeals reasoned correctly that because "a civil matter is commenced by filing a complaint with the court," members of a class in respondents' position had satisfied the statute when the class action was filed.[111] If the class had succeeded, there could be no question that respondents were properly before the court within the statute of limitations. When it failed, *only because the trial court in its discretion wanted the*

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[110] *Id.*

[111] Petitioners' Brief for Certiorari, App. D at 36-39; 473 F.2d at 583-84.

claims presented in a different form of proceeding, it could not be said that the respondents were then never before the court, but only that they were out of court and again in exactly the same position as when the class action was filed. The decision of the Ninth Circuit is correct and should find proper application in the future consistent with the facts of other cases.

CONCLUSION

The decision of the Court of Appeals for the Ninth Circuit is correct and should be affirmed.

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IN THE

Supreme Court of the United States

October Term, 1972
No. 72-1195

AMERICAN PIPE AND CONSTRUCTION CO., SMITH-SCOTT CO., INC., UNITED CONCRETE PIPE COMPANY, KAISER STEEL CORPORATION, UNITED STATES STEEL CORPORATION, U.S. INDUSTRIES, INC., UTAH CONCRETE PIPE COMPANY, W. R. WHITE COMPANY, all corporations,

Petitioners,

vs.

STATE OF UTAH, a body politic, *et al.*,

Respondents.

PETITIONERS' REPLY BRIEF.

Statement of the Case.

The statement of the case is set forth at length in the Brief for Petitioners, pages 3 through 11. In response thereto in their opening brief, Respondents predicate their position upon the following propositions:

1. Respondents were before the court when the abortive class action was filed by Utah (Brief for Respondents, pp. 15 and 17) and therefore their respective causes of action were not barred by the statute of limitations.

2. The barring provisions of Section 5(b) of the Clayton Act are modified by Rule 23, F.R.Civ.P. (p. 12, *et seq.*).

3. The District Court precluded Respondents from timely intervention (Brief for Respondents, p. 20).

4. The decision of the District Court was not predicated upon an exercise of discretion within the meaning of Rule 24(b), F.R.Civ.P. (Brief for Respondents, p. 29).

Petitioners submit that the foregoing propositions are demonstrably erroneous for the reasons hereinafter set forth.

ARGUMENT.

I.

Respondents Were Not Before the Court When the Utah Action Was Filed.

The Brief for Respondents states the controlling question herein as follows (Brief for Respondents at p. 11):

> "The question before the Court is whether intervenors who are members of an abortive class are entitled to the benefits of the date of the commencement of a Sherman Act § 1 class action for purposes of the statute of limitations. It is a question of first impression involving the relationship between § 5(b) of the Clayton Act and Rule 23 of the Federal Rules of Civil Procedure. Specifically the court must decide whether an action is 'commenced' within the meaning of § 5(b) as to absentee plaintiffs when a class action complaint is filed timely but denied class action status by the trial court after the limitations period has run."

The foregoing correctly states one of the paramount issues herein. Respondents purport to resolve the foregoing issue with the following statement (Brief for Respondents at p. 9):

> "The commencement of the Sherman Act § 1 class action halts the running of the statute of limitations as against all members of the alleged class. If it is subsequently determined by a court that the case cannot be maintained as a class action pursuant to Rule 23, the purported members should be granted reasonable time within which to intervene."

Respondents' conclusion is not supported by Rule 23, F.R.Civ.P., which specifies certain prerequisites to a class action which Judge Pence found to be lacking.[1]

Respondents' contentions are predicated upon the contradictory premise inherent therein which was adopted by the Court of Appeals, *i.e.*, that even though the statutory prerequisites to a class action are not met, the claims of parties who are not authorized to be before the court pursuant to Rule 23 were, in fact, before such court pursuant to such rule.[2] Rule 23 does not provide that absent parties are before the court when the prerequisites to a class action are not met. It follows that Respondents' contention is contrary to a well-settled principle that the legal consequences flowing from a proposed class action "must be found within the four corners of amended Rule 23 * * *."[3]

Respondents' argument that they were before the court by reason of the filing of an invalid class action is based upon the following reasoning:

> "The respondents, as members of an abortive class, are in a position similar to absentee plaintiffs who sought to intervene in spurious class

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[1]A. 344-45; R. 346-47. A. 353; R. 356. Respondents' contention (Brief for Respondents, p. 17) that "the class action did exist" is anomalous and constitutes an obvious collateral attack on the finding of the trial court contrary thereto. The order of the District Court respecting the class action is not the subject of this appeal.

[2]The cases relied upon by Respondents are cases in which class actions were found to be proper. *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961); *Esplin v. Hirschi*, 402 F.2d 94 (10th Cir. 1968); *accord, State of Minnesota v. United States Steel Corporation*, 44 F.R.D. 559 (D. Minn. 1968); and *York v. Guaranty Trust Co. of New York*, 143 F.2d 503, 529 (2d Cir. 1944).

[3]*Eisen v. Carlisle* (2d Cir. Op. May 1, 1973) ATRR No. 612, May 8, 1973 at F-1, F-4.

actions under old Rule 23. Such a proceeding was really not a class action at all. The decree in a spurious class action was not binding on the entire class, but merely a procedural device, an invitation for permissive joinder. If the filing of a spurious class action under old Rule 23 'commenced' an action as to the unnamed and absent plaintiffs within the meaning of § 5(b), the filing of the class action complaint in the instant case under new Rule 23, which makes the judgment binding on all members, should certainly suffice." (Brief for Respondents, p. 15).

Such argument ignores the prerequisites to Rule 23, F.R.Civ.P., established by the 1966 amendment. Rule 23(a) now provides, in part, as follows:

"(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all *only if* (1) the class is so numerous that joinder of all members is impractical * * *." (Emphasis added).

The addition of the word "only" in the 1966 amendment underscores the conclusion that the prerequisites to Rule 23 must be met before a class action has legal consequences; otherwise the word "only" would be without meaning.

Respondents' brief, page 23, summarizes the position of the Court of Appeals as follows:

"The Court of Appeals found no conflict between § 5(b) of the Clayton Act and Rule 23 since it held that the instant lawsuit 'was commenced by Utah eleven days before the running of the statute.' In other words, under the facts the action was "commenced' within the meaning of § 5(b), and the rights of the absentee plaintiffs were not barred by the statute of limitations."

The statement by the Court of Appeals that the action "was commenced by Utah eleven days before the running of the statute" and, therefore, was commenced within the meaning of 5(b), necessarily makes the assumption we have heretofore demonstrated to be erroneous, *i.e.*, that interveners and their separate causes of action were before the court by reason of an invalid class action.

Even where a true class action exists, the class is not an entity; it consists of separate persons with separate causes of action. The language of Rule 23(b)(1) clearly indicates that it is a procedural device for the prosecution of "separate actions." Upon the filing of Utah's complaint, only one party was actually before the court by virtue of having undertaken to assert its alleged claims—Utah. The Ninth Circuit chose to treat the would-be class members as if they had filed suit. Fictions aside, however, they had done nothing. They delayed filing their separate actions until a date more than five months after the statute of limitations had run.

In support of their position, Respondents quote *Leh v. General Petroleum Corp.*[4] in which the court cautioned against "a niggardly construction of the statutory language" of 5(b). Respondents call for "a liberal interpretation of 5(b)" and state (Brief for Respondents, p. 23):

> "Again, in *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, the Court observed that 'In 5(b) Congress meant to assist private litigants in utilizing any benefits they might cull from government antitrust actions.' "

[4]382 U.S. 54 (1965).

Respondents are seeking a liberal interpretation of the tolling provisions of 5(b) but seek to abrogate its barring provisions. Assuming *arguendo* that Respondents, as public bodies, are also private litigants, it goes without saying that in enacting Section 5(b), Congress meant to assist such litigants. Congressional intent is clearly controlling but the scope and extent of the assistance intended by Congress is clearly delineated by the requirement that a plaintiff "bring his action either (a) within the suspension period, *i.e.*, within 1 year after the Government suit had terminated, or (b) within 4 years after his cause of action had accrued."[5] The would-be interveners have failed to meet this test. Thus, the position of Respondents is in contradiction with the principles stated by this Court in *Holmberg v. Armbrecht*,[6]

> "If Congress explicitly puts a limit upon the time for enforcing a right which it created, there is an end of the matter. The Congressional statute of limitation is definitive."

It follows that neither valid nor invalid class actions filed pursuant to Rule 23, F.R.Civ.P., should have any

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[5]In H.R. Rep. No. 422, April 1955, 84th Cong. 1st Sess. 2 (1955), the following expression of such congressional intent appears:

> "While the committee believes it important to safeguard the rights of plaintiffs by tolling the statute during the pendency of Government antitrust actions, it recognizes that in many instances the long duration of such proceedings taken in conjunction with a lengthy statute of limitations may tend to prolong stale claims, unduly impair efficient business operations, and overburden the calendars of courts. It believes the provisions of this bill will tend to shorten the period over which private treble damage cases will extend by requiring that the plaintiff bring his suit within 4 years after it accrued or within 1 year after the Government's case has been concluded."

[6]327 U.S. 392, 395 (1946).

bearing upon the question as to whether Respondents have brought their separate actions within the time period delineated by Section 5(b) of the Clayton Act.

II.

The Barring Provisions of Section 5(b) of the Clayton Act Are Not Abrogated or Abridged by Rule 23, Federal Rules of Civil Procedure.

Despite their contention that Section 5(b) and Rule 23 are not in conflict, Respondents' brief impliedly concedes that the judgment of the Court of Appeals can be sustained only by the premise that the barring provisions of Section 5(b) of the Clayton Act are abridged by Rule 23, F.R.Civ.P. Thus, Respondents' brief states in part as follows (p. 12):

> "In order to reach a wise and just decision in the instant case, it is necessary to consider the facts carefully, and in light of the circumstances weigh competing principles in order to give effect to the broad policy considerations upon which they are based. On one hand we have a statute wherein Congress determined that whenever the running of the statute of limitations in any case such as this is suspended by prior governmental action, any action shall be barred unless commenced either within the period of suspension or within four years after the cause of action accrued. On the other hand we have Rule 23 of the Federal Rules of Civil Procedure, a rule designated to facilitate adjudication of numerous claims with judicial economy. It is then necessary to construe § 5(b) vis-a-vis Rule 23 in the light of the facts of this action."

The foregoing statement is followed by an extended discussion of the foregoing issue (Brief for Respondents, pp. 12-29). We have heretofore noted the statement (Brief for Respondents, p. 23) that Congress meant to assist private litigants in enacting 5(b) and that the congressional intent in enacting 5(b) must be considered (Brief for Respondents, pp. 24-27). Additionally, Respondents contend (Brief for Respondents, p. 27) that in resolving the apparent conflict between 5 (b) and Rule 23, the purposes and policy of Rule 23 must be considered.

The latter contention implies that a conflict exists between Rule 23, F.R.Civ.P., and Section 5(b) of the Clayton Act which must be resolved by a holding that Section 5(b) of the Clayton Act is somehow limited by Rule 23. If that is not Respondents' contention, the foregoing discussion by Respondents is irrelevant. Indeed, if the requirements of 5(b) have not been abrogated, it must necessarily follow that the judgment of the Court of Appeals must be reversed since admittedly Respondents have not brought their action within the suspension period designated by 5(b) by taking the minimal steps required by Rule 8, F.R.Civ.P. (see Brief for Petitioners, pp. 37-38). Indeed, the would-be interveners took no action whatsoever prior to the running of the statute of limitations.

As pointed out in Brief for Petitioners, page 23, the concept that 5(b) can be limited by Rule 23 is clearly contrary to the congressional intent. House Report Number 422 clearly states that under Section 5(b) a treble damage claimant "*would be required to bring his action either* (a) within the suspension period, *i.e.*, within 1 year after the Government suit had terminated,

or (b) within 4 years after his cause of action accrued." (Emphasis added).

Respondents' brief seeks to evade the well-established rule, which is discussed at length in Brief for Petitioners, that substantive rights cannot be abridged or enlarged by rules of procedure. In response thereto, Respondents imply that Section 5(b) does not establish any substantive right. They rely (Brief for Respondents, pp. 24-25) upon *Burnett v. New York Central Railroad Co.*[7] for the proposition: "the fact that the right and limitation are written into the same statute does not indicate a legislative intent as to whether or when the statute of limitations should be tolled. Thus the 'substantive—procedural' distinction would seem to be of little help in deciding questions of extending the limitation period." We agree completely with the *Burnett* decision, in which the petitioner's timely filing in the state court was held to have vindicated the congressional policy underlying the pertinent statute of limitations. This is in contrast to this case in which Petitioners filed no action whatsoever until after the period prescribed in the statute of limitations. In the *Burnett* decision, the Supreme Court held: "The basic question to be answered in determining whether, under a given set of facts, a statute of limitations is to be tolled, is one 'of legislative intent whether the right shall be enforceable . . . after the prescribed time.' "[8] Both the express terms of Section 5(b) and the plainly stated

[7]380 U.S. 424 (1965).
[8]*Id.* at 426.

congressional intent in House Report No. 422 leave no doubt that Congress did not wish private claimants to assert antitrust claims more than four years after their accrual or (when the suit is based upon a Government action) one year after the termination of such Government suit, whichever occurs later. The *Burnett* decision wholly undermines Respondents' contentions. This case is, therefore, within the elementary rule that only those statutes which are ambiguous or of doubtful meaning are subject to the detailed statutory analysis and interpretation urged in Respondents' brief.[9] Respondents' separate causes of action were not on file prior to December 12, 1969, a date more than five months after the termination of the foregoing suspension. Thus, the decision of the Ninth Circuit is in square contradiction to the foregoing statute of repose since it eliminates the requirement that the litigant "*bring his action either (a) within the suspension period, i.e.,* within 1 year after the Government suit had terminated or (b) within 4 years after his cause of action accrued."[10]

". . . [T]he right to bar an action for lapse of time is a substantive right."[11] Respondents' contention that

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[9]*Packard Motor Car Co. v. National Labor Relations Board,* 330 U.S. 485, 492 (1947).

[10]H.R.Rep. No. 422, April 1955, 84th Cong. 1st Sess. 2 (1955) (Emphasis added).

[11]The test of whether a statute of limitations is substantive in character is whether or not such statute does "significantly affect the result of a litigation * * *." *Guaranty Trust Co. v. York,* 326 U.S. 99, 109-10 (1945). Based upon this principle the Ninth Circuit has held that "* * * the right to bar an action for lapse of time is a substantive right." *John E. King v. Alaska Steamship Company,* 431 F.2d 994, 996 (9th Cir. 1970). The

(This footnote is continued on next page)

the barring provisions of 5(b) are abrogated by Rule 23, F.R.Civ.P. is contrary to the Enabling Act authorizing the Supreme Court to promulgate the Federal Rules (28 U.S.C. 2072) which expressly prohibited the Court from promulgating rules which "abridge, enlarge or modify any substantive right." Such contention is also contrary to the hornbook principle that court rules are subject to pertinent congressional statute.[12] The applicable doctrine is well stated in *Philadelphia Electric Company v. Anaconda American Brass Company*:[13]

> "Surely it was not the intention of the Committee, the Supreme Court, or the Congress that the 1966 amendments to Rule 23 should have any effect upon the period of limitations established by Congress, 15 U.S.C. §§ 15b, 16(b), as amended. Any such purpose would run counter to the statutory prohibition against rules which 'abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072."

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suggestion (Brief for Respondents, p. 26) that Section 5(b) is a mere procedural statute is based upon a statement by a member of the House Judiciary Committee that the statute "is simply a procedural change and suggested with the thought of setting up a uniform statute of limitations." It is obvious that Rep. Quigley's statement was directed to the uniform provisions of the act and not the barring provisions. To the extent such remarks are inconsistent with the clearly expressed legislative intent reflected in H.R. Rep. No. 422, April 1955, 84th Cong., 1st Sess. 2 (1955), the latter is controlling. *Binns v. United States*, 194 U.S. 486 (1903); *Lapina v. Williams*, 232 U.S. 78, 90 (1913); *cf. McLean v. United States*, 226 U.S. 374 (1912); *Wright v. Mountain Trust Bank*, 300 U.S. 440 (1936).

[12]*Palermo v. United States*, 360 U.S. 343 (1959); *Ex parte The City Bank of New Orleans*, 44 U.S. 292 (1845); *cf. Funk v. United States*, 290 U.S. 371 (1933), and *Gordon v. United States*, 344 U.S. 414 (1952).

[13]43 F.R.D. 452, 460 (E.D. Pa. 1968).

III.

The District Court Did Not Preclude Respondents From Timely Intervention.

The following statement is made in Brief for Respondents (p. 20):

> "The trial court then determined that the action could not be maintained as a class action since the court, as a matter of judicial administration, preferred to handle the claims through joinder of any additional claims. Consistent with these findings, the trial court could not deny the motions to intervene, which it had in fact invited, on grounds that permissive intervention would unduly delay the adjudication of the rights of the original parties."

Contrary to the foregoing contention, the trial court pointed out that Respondents' counsel had been studying its proposed cause of action for six months prior to the filing of the Utah Complaint and was charged with knowledge of the attendant problems concerning a further class action when use of this procedural device had been exhausted by several prior class actions. The opinion of the trial court respecting a class action did not constitute an invitation to intervene after the statute of limitations had run; the court merely designated the procedures which Respondents should have followed had they elected to take timely action. As stated by the trial court:

> "* * * It should have been unquestioned on the part of the plaintiffs' attorneys that individual action by affected parties, particularly the states, large cities and other large public entities in the Western Area, should have been taken long before

any class action was belatedly filed in this case, if in fact any of them believed the alleged conspiracy had injured them."[14] (See Brief for Petitioners, pp. 39-43).

Thus, Respondents are in an inescapable dilemma with respect to the issue of timeliness. If, as they contend, they were represented by the State of Utah when the action was filed, they are charged with Utah's knowledge that the class action device had been exhausted by the group of prior class actions in which they were invited to join and with such knowledge, refrained from requesting intervention until a date more than five months after the statute of limitations ran. If they are not represented by Utah they are in the same category as any other litigant who failed to file suit in a timely manner.

IV.

The Decision Below Reversing a Discretionary Ruling of the District Court Was Not Based on a Showing of Abuse of Discretion and Is, Therefore, in Conflict With the Decisions of This Court and With Other Circuits as Well as the Plain Language of Rule 24(b), Federal Rules of Civil Procedure.

Respondents have not controverted the numerous factors considered by the trial court in exercising its discretion. Such factors are set forth in the Brief for Petitioners (pp. 39-43). Nevertheless, the following statement is made in Respondents' brief (p. 29):

> "The trial court did not deny intervention as an exercise of its discretion; rather, intervention was denied because of the court's holding as to the statute of limitations. The Court of Appeals had no other question before it."

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[14] 49 F.R.D. 17, 21; A. 354; R. 356-57.

It is true that in the exercise of its discretion the court considered the issue of the statute of limitations. However, it is untrue that no other issue was considered by the trial court and it is likewise erroneous for Respondents to suggest that the issue of abuse of discretion was not before the Ninth Circuit. The issue was the subject of oral argument before the Ninth Circuit and Petitioners' brief before the Ninth Circuit argued the proposition that Respondents "Have No Basis for Appeal From the Denial of Permissive Intervention." Such brief also urged the proposition that "The District Court Did Not Abuse its Discretion." (See Appendix "A" hereto).

Petitioners' brief before the Court of Appeals also reflects the following language:

> "Applicants have no right to appeal from the denial of permissive intervention because they have failed to show that such denial constitutes an abuse of discretion. Applicants waited until their claims had become barred by the statute of limitations. To allow intervention at this late date would impose tremendous burdens on Appellees inasmuch as witnesses have died, memories have faded and record depositors have been discontinued."[15]

Based *inter alia* upon the foregoing arguments, the dissenting opinion of Judge Kilkenny stated as follows:

> "I believe the trial judge exercised a legal discretion and that the appellants, on the record before us, have not shown an abuse of his appraisal of the issues presented on the applications for intervention. I would affirm on the basis of

[15]The relevant pages of the Petitioners' brief before the Ninth Circuit are set forth in Appendix "A" hereto.

the trial judge's decision. *State of Utah v. American Pipe & Construction Co.*, 50 F.R.D. 99 (C.D. Cal. 1970)."[16]

Since the judgment of the Court of Appeals was not based on a showing of abuse of discretion, it is, therefore, in conflict with the decisions of this Court and with other circuits[17] as well as with the plain language of 24(b), F.R.Civ.P., *i.e.*, that discretionary decisions of the District Courts are to be reversed only upon a clear showing of abuse of discretion. Moreover, the whole issue of timely application by Respondents "must be answered * * * by exercise of the sound discretion of the trial court."[18] In the light of the history of the West Coast Pipe Cases (in which Respond-

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[16]Petition for a Writ of Certiorari, Appendix D, page 39.

[17]*Railroad Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 91 L.ed. 1646 (1947); *Kam Koon Wan v. E. E. Black, Ltd.*, 75 F.Supp. 553, 564 (D. Hawaii 1948); *See, FMC Corporation v. Keizer Equipment Company*, 433 F.2d 654, 656 (6th Cir. 1970); *Bumgarner v. Ute Tribe of Uintah and Ouray Res.*, 417 F.2d 1305, 1309 (10th Cir. 1969); *Edmondson v. State of Nebraska*, 383 F.2d 123, 127 (8th Cir. 1967); and *Stadin v. Union Electric Company*, 309 F.2d 912 (8th Cir. 1962). *Accord, Athas v. Day*, 161 F.Supp. 916-19 (D.Col. 1958); *cf. Hobbs v. Police Jury of Morehouse Parish*, 49 F.R.D. 176, 179-80 (W.D. La. 1970).

> "The trial court may take into account all the circumstances of the case, including any circumstances contributing to delay in the application for intervention. [Citing cases] * * * '[T]he most important factor' which should be considered by the trial cout 'is whether any delay in moving for intervention will prejudice the existing parties to the case.' 2 Barron & Holtzoff, *supra*, § 594, at 366." *Smith Petroleum Service, Inc. v. Monsanto Chemical Co.*, 420 F.2d 1103, 1115 (5th Cir. 1970).

United States v. Blue Chip Stamp Company, 272 F.Supp. 432, 435 (C.D. Calif. 1967); and *Basle Theatres, Inc. v. Warner Bros. Pictures Dist. Corp.*, 24 F.R.D. 476 (W.D. Pa. 1959).

[18]*Basle Theatres, Inc. v. Warner Bros. Pictures Dist. Corp.*, 24 F.R.D. 476 (W.D. Pa. 1959).

ents were members of a class who were invited to intervene), the decision of Judge Pence is within the doctrine, "the courts do not look with favor upon one who, fully aware of what has transpired, nonetheless fails to act on his rights and is unreasonably tardy in filing a petition for intervention."[19]

V.

Conclusion.

This Court should vacate the judgment of the Court of Appeals dated January 31, 1973, and should issue its mandate directing reinstatement of the aforesaid order of the District Court.

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[19]*United States v. Blue Chip Stamp Company*, 272 F.Supp. 432, 436 (C.D. Cal. 1967).

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APPENDIX A.

BRIEF FOR APPELLEES [PETITIONERS HEREIN] IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

I. Applicants Have No Basis for Appeal From the Denial of Permissive Intervention Where Such Denial Is Based Upon the Exercise of Sound Discretion and Upon the Fact That Their Claims Are Barred by the Statute of Limitations.

Despite the suggestion of Applicants to the contrary, the District Court denied permissive intervention on *two* grounds: *first*, as a matter of discretion, because ". . . to permit even a limited intervention on the part of petitioners for the purpose of conducting joint discovery proceedings would in the context of this case, seriously prejudice the rights of the defendants, and unnecessarily complicate and delay resolution of discovery problems arising in Utah's case;"[82] and *second*, as required by statute, because to allow Applicants to avoid the bar of Section 5(b) by means of the Federal Rules of Civil Procedure would unlawfully abridge substantive rights of antitrust defendants.[83] Both grounds are consistent with the court's decision to allow intervention for purposes of asserting claims arising during the four-year period preceding the filing of the motions to intervene. Claims arising during that period would clearly not be barred by Section 5(b), and assertion of such claims would not prejudice the rights of defendants or delay resolution of Utah's case because it is almost certain that no viable claims could be asserted for that period—the evidence obtained in

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[82]R. 450; 50 F.R.D. at 102.

[83]R. 460; 50 F.R.D. at 108.

the West Coast Pipe Cases having indicated that the alleged conspiracy terminated long before that four-year period.[84]

Accordingly, in order to prevail on their appeal, Applicants must bear the unenviable burden of establishing that the District Court abused its discretion in denying intervention *and* that it was incorrect as a matter of law on its determination of the statute of limitations question.

(1) The District Court Did Not Abuse Its Discretion.

We have demonstrated above that the District Court exercised its discretion in denying permissive intervention. Accordingly, it is incumbent upon Applicants to establish that in denying intervention the District Court abused that discretion.

See,

Martin v. Kalvar Corporation, 411 F. 2d 552, 553 (5th Cir. 1969);

Edmondson v. State of Nebraska, 383 F. 2d 123, 127 (8th Cir. 1967);

Lipsett v. United States, 359 F. 2d 956, 959 (2d Cir. 1966); and

3B Moore, *Federal Practice*, ¶ 24.15, p. 24-562.

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[84]"For all antitrust (money) purposes, the only evidence so far developed in the massive prior litigation involving the same alleged conspiracies indicates with almost absolute certainty that any such conspiracies terminated at least by the end of 1962. Digging into all Sherman 1 claims for the four years immediately prior to May 13, 1969 would, therefore, to an equally almost absolute certainty, produce nothing but a dry and expensive hole for the petitioners, with no monetary recovery whatsoever. (The court here is not prejudging; it is prognosticating.) While the court cannot foreclose the petitioners from the questionable pleasure of digging such a hole, it will here bypass that segment of petitioners' allegations." R. 449; 50 F.R.D. at 101, n. 2.

Because Applicants contend that the District Court did not exercise its discretion, they have not offered any argument with respect to abuse. Several points made by Applicants do bear some relationship to that issue, however, and will be dealt with in that context.

In their Opening Brief, Applicants contend that the District Court placed them in a difficult position by denying both the class action and intervention. They assert that these decisions are inconsistent.[35] Initially, it should be pointed out that the District Court did not place Applicants in a "difficult position;" Applicants themselves created such difficult position by failing to file a complaint or to move to intervene until after their action was barred by the statute of limitations. Inasmuch as Applicants had many opportunities to join several previous class actions against Appellees, they cannot predicate a right to intervene at this late hour on their own dilatory conduct.[36] Additionally, it is abundantly clear that Applicants are incorrect in their assertion that the District Court contradicted itself in denying both the class action and intervention. Assuming *arguendo* that the class action decision and the intervention decision were in fact contradictory, Applicants' argument would necessarily question the validity of the class action decision as well as the intervention decision. The class action decision, however, is not open to attack. Having failed to take an appeal from the order respecting the class action, which order was entered on December 4, 1969 and is in all respects final,[37]

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[35]Appellants' Opening Brief, p. 10.

[36]R. 463; 50 F.R.D. at 109.

[37]See, *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 93 L. Ed. 1528, 1536 (1949), and *Eisen v. Carlisle & Jacquelin*, 370 F. 2d 119, 120 (2d Cir. 1966).

and having entered into the Agreed Statement on Appeal which provides that "the question presented on appeal is 'Did the Court err in denying the aforesaid motion to intervene?'",[38] Applicants cannot now question that decision by alleging that either it or the intervention must be incorrect because both cannot be correct. To do so would constitute an improper collateral attack upon that decision.[39] Instead, they must establish that they clearly should have been allowed to intervene and that the District Court's decision to the contrary is such egregious error as to constitute abuse of discretion. They have not even attempted to make such a showing.

The foregoing notwithstanding, the class action and intervention decisions are not inconsistent. In ordering that Utah's action not be maintained as a class action, the District Court found that Utah had not described a class, that the actual number of potential claimants was not so large as to warrant maintenance of a class action and that a class action was not superior to other available methods for trying the case.[40] On the other hand, the District Court's denial of intervention was based on the fact that intervention "would in the context of this case, seriously prejudice the rights of the defendants, and necessarily complicate and delay resolution of discovery problems arising in Utah's case."[41] Applicants seem to suggest that the District Court contradicted itself and based its prediction of prejudice and delay on the fact that Applicants were so numer-

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[38]Paragraph 15 of the Agreed Statement on Appeal, R. 6. See also, Applicants' Opening Brief, p. 2 (Statement of Issues).

[39]Fed. R. App. P., Rule 4.

[40]R. 346-347 [Ex. I].

[41]R. 451; 50 F.R.D. at 102.

ous that their joinder would render administration of the law suit difficult or impossible. Such is clearly not the case. The District Court did not deny intervention altogether. It was willing to permit intervention for the purpose of asserting claims relating to the four-year period preceding the filing of the applications to intervene. The District Court's findings of fact demonstrate conclusively that it refused to allow the assertion of claims relating to an earlier period because Appellees would be prejudiced by the unjustified dilatory conduct of Applicants in waiting until after the statute of limitations had run on those claims before bringing any action.[42] Those findings make it quite clear that such prejudice was wholly unrelated to the number of would-be intervenors and would have resulted from the intervention of any one of them. Moreover, inasmuch as "defendants as well as plaintiffs have equal rights to 'fairness and due process' "[43] and inasmuch as Appellees have already been harmed badly by the decision in *Maricopa County v. American Pipe and Construction Co.*,[44] which extended substantially the tolling provisions of Section 5(b), the District Court could not, consistent with fairness, allow Applicants to intervene and relate their claims back to a time prior to the running of the statute of limitations. It is well settled that where prejudice would accrue to defendants by reason of the motion to intervene, it must be denied, particularly where there are compelling equities in favor of defendants and against plaintiffs.

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[42]R. 444 [Ex. M].
[43]R. 463; 50 F.R.D. at 109
[44]303 F. Supp. 77, 87 (D. Ariz. 1969).

See,

Stickler Eng'r Corp. v. Michael Flynn Mfg. Co., 23 F.R.D. 12 (E.D. Pa. 1958);

Kimberly Knitwear v. Hall, 20 F.R.D. 145 (S.D.N.Y. 1957); and

United States v. Loew's Inc., 20 F.R.D. 423 (S.D.N.Y. 1957).

Applicants have shown nothing to indicate abuse of discretion on the part of the District Court. Therefore, in light of the leeway traditionally afforded trial courts in dealing with permissive intervention and in light of the special insight into the West Coast Pipe Cases gained by Judge Pence in administering such cases, the denial of permissive intervention should be upheld as a proper exercise of discretion.

(Brief for Appellees, pages 13-18).

IV.

Conclusion.

It is apparent that the District Court's decision denying intervention as a matter of right pursuant to Rule 24(a)(2) and permissive intervention pursuant to Rule 24(b)(2) was wholly correct. Applicants have no interest in the subject matter of the instant litigation which would justify their intervention, and their applications were not timely, having been filed after Applicants' claims were barred by the statute of limitations. Accordingly, Applicants have not and cannot meet the requirements of Rule 24(a)(2).

Applicants have no right to appeal from the denial of permissive intervention because they have failed to show that such denial constitutes an abuse of discre-

tion. Applicants waited until their claims had become barred by the statute of limitations. To allow intervention at this late date would impose tremendous burdens on Appellees inasmuch as witnesses have died, memories have faded and record depositors have been discontinued. Applicants cannot intervene to assert claims that are barred by the statute of limitations. The mandatory time limit set by Section 5(b) cannot be extended by any procedural device such as a class action allegation. Moreover, even the erroneous vicarious filing rationale which has been asserted in connection with the filing of class actions is not available to Applicants here. No valid class action was filed therein; so no vicarious filing can have taken place.

Accordingly, the decision below must be affirmed.

(Brief for Appellees, pages 32-33).

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

AMERICAN PIPE & CONSTRUCTION CO. ET AL. *v.* UTAH ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 72-1195. Argued November 12, 1973—
Decided January 16, 1974

Eleven days short of a year after a final consent judgment had been entered against petitioners in civil actions by the Government to restrain federal antitrust violations (which actions had been filed almost four years before entry of that judgment), the State of Utah commenced a Sherman Act treble-damages class action against petitioners, in which the State purported to represent various state and local agencies and certain other Western States. The action was found to be timely under the federal four-year statute of limitations governing antitrust suits (§ 4B of the Clayton Act) because of § 5 (b) of that Act providing that whenever the United States institutes any proceeding to restrain antitrust violations, the running of the statute of limitations in respect of every private right of action arising under such laws and based on any matter complained of in such proceeding shall be suspended during the pendency thereof and for one year thereafter. The District Court thereafter granted petitioners' motion for an order pursuant to Fed. Rule Civ. Proc. 23 (c)(1) that the suit could not be maintained as a class action, the court finding that although the prerequisites to a class action contained in Rule 23 (a)(2) through (4) had been met, the requirement of Rule 23 (a)(1) that "the class [be] so numerous that joinder of all members is impracticable" was not satisfied. Eight days after entry of this order, respondent towns, municipalities, and water districts, all of which had been claimed as members of the original class, moved to intervene as plaintiffs in Utah's action, either as of right under Fed. Rule Civ. Proc. 24 (a)(2) or by permission under Rule 24 (b)(2), but the District Court denied this motion, concluding that the limita-

Syllabus

tion period had run as to all those respondents and had not been tolled by institution of the class action. The Court of Appeals reversed as to denial of permission to intervene under Rule 24 (b)(2), finding that as to the members of the class Utah purported to represent, suit was actually commenced by Utah's filing of the class action. *Held:*

1. The commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the requirement of Rule 23 (a)(1) been met, and here where petitioners, who were purported members of the class, made timely motions to intervene after the District Court had found the suit inappropriate for class action status, the institution of the original class suit tolled the limitations statute for petitioners. Pp. 13–17.

2. A judicial tolling of the statute of limitations does not abridge or modify a substantive right afforded by the antitrust acts; the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose. Pp. 17–20.

3. The District Court's determination in denying permission to intervene that petitioners were absolutely barred by the statute of limitations, was not an unreviewable exercise of discretion but rather a conclusion of law which the Court of Appeals correctly found to be erroneous. Pp. 20–21.

4. The commencement of the class action suspended the running of the limitations period only during the pendency of the motion to strip the suit of its class action character. Since the class action was filed with 11 days yet to run in the period as tolled by § 5 (b), the intervenors had 11 days after entry of the order denying them participation in the class suit in which to move to file their intervention motion. Their filing only 8 days after the entry of such order was thus timely. Pp. 21–22.

473 F. 2d 580, affirmed.

STEWART, J., delivered the opinion for a unanimous Court. BLACKMUN, J., filed a concurring opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 72-1195

American Pipe and Construction Co. et al., Petitioners, *v.* State of Utah et al.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 16, 1974]

MR. JUSTICE STEWART delivered the opinion of the Court.

This case involves an aspect of the relationship between a statute of limitations and the provisions of Fed. Rule Civ. Proc. 23 regulating class actions in the federal courts. While the question presented is a limited one, the details of the complex proceedings, originating almost a decade ago, must be briefly recounted.

On March 10, 1964, a federal grand jury returned indictments charging a number of individuals and companies, including the petitioners here, with criminal violations of § 1 of the Sherman Act, 15 U. S. C. § 1. The indictments alleged that the defendants combined and conspired together in restraint of trade in steel and concrete pipe by submitting collusive and rigged bids for the sale of such pipe and by dividing and allocating business among themselves. Shortly thereafter, on June 19, 1964, pleas of *nolo contendere* were accepted and judgments of guilt were entered. Four days later, on June 23, 1964, the United States filed civil complaints in the United States District Court for the Central District of California against the same companies, which complaints, as subsequently amended, sought to restrain

further violations of the Sherman Act and violations of the Clayton and False Claims Acts. These civil actions were the subject of extended negotiations between the Government and the defendants which culminated in a "Final Judgment," entered on May 24, 1968, in which the companies consented to a decree enjoining them from engaging in certain specified future violations of the antitrust laws.[1]

Eleven days short of a year later, on May 13, 1969, the State of Utah commenced a civil action for treble damages against the petitioners in the United States District Court for the District of Utah, claiming that the petitioners had conspired to rig prices in the sale of concrete and steel pipe in violation of § 1 of the Sherman Act. The suit purported to be brought as a class action in which the State represented "public bodies and agencies of the state and local government in the State of Utah who are end users of pipe acquired from the defendants" and also those States in the "Western Area" which had not previously filed similar actions. This action was found to be timely under the federal statute of limitations governing antitrust suits[2] because of the provision of § 5 (b) of the Clayton Act, 15 U. S. C. § 16 (b), which states that

"Whenever any civil or criminal proceeding is

[1] Consent decrees binding each of the petitioners other than American Pipe and Construction Company were entered on December 8, 1967; however, in an earlier action the District Court determined that the "Final Judgment" entered on May 24, 1968, was final as to all petitioners. *Maricopa County* v. *American Pipe and Construction Co.*, 303 F. Supp. 77, 87 (Ariz. 1969).

[2] Section 4B of the Clayton Act, 15 U. S. C. § 15b, provides in pertinent part as follows:

"Any action to enforce any cause of action [under the antitrust laws] shall be forever barred unless commenced with four years after the cause of action accrued."

> instituted by the United States to prevent, restrain, or punish violations of any of the antitrust laws, . . . the running of the statute of limitations in respect of every private right of action arising under said laws and based in whole or in part on any matter complained of in said proceeding shall be suspended during the pendency thereof and for one year thereafter . . . ."[3]

Since the Government's civil actions against the petitioners had ended in a consent judgment entered on May 24, 1968, Utah's suit, commenced on May 13, 1969, was timely under § 5 (b) with 11 days to spare.[4]

On a motion made by the majority of the petitioners, the suit was subsequently transferred by the Judicial Panel on Multidistrict Litigation from Utah to the United States District Court for the Central District of California for trial by Judge Martin Pence, Chief Judge of the District of Hawaii, sitting in the California District by assignment. The transfer and assignment were found appropriate because of the prior concentration of more than 100 actions arising out of the same factual situation in the Central District of California before Judge Pence. 303 F. Supp. 507, 508–509 (J. P. M. L.).

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[3] The section contains the additional proviso that

"whenever the running of the statute of limitations . . . is suspended hereunder, any action to enforce such cause of action shall be forever barred unless commenced either within the period of suspension or within four years after the cause of action accrued."

[4] The petitioners had earlier argued that since there was a four-day hiatus between the entry of judgment on the pleas of *nolo contendere* in the criminal actions and the commencement of the government civil suit, the tolling period provided by § 5 (b) should have begun to run from the termination of the criminal proceedings. This contention was rejected in *Maricopa County* v. *American Pipe and Construction Co.*, *supra*, 303 F. Supp., at 83–86, and has not been pressed here.

In November 1969 the petitioners moved for an order pursuant to Fed. Rule Civ. Proc. 23 (c)(1) that the suit could not be maintained as a class action.[3] This motion was subsequently granted. In his memorandum opinion in support of the order granting the motion Judge Pence found that those "prerequisites to a class action" contained in Rule 23 (a)(2) through (4) appeared to have been met, or at least that minor deficiencies in meeting those standards for determining the suitability of proceeding as a class would "not be fatal to the plaintiffs' class action." 49 F. R. D. 17, 20.[4] But the requirement of Rule 23 (a)(1) that "the class [be] so numerous that joinder of all members is impracticable" was found by Judge Pence not to be satisfied: While the complaint had alleged that the members of the class totaled more that 800, Judge Pence, relying on his extensive experience in dealing with litigation involving the same defendants and similar causes of action, concluded that the number of entities which ultimately could demonstrate injury from the trade practices of the petitioners was far lower, and, further that "[f]rom prior actual experience in like cases involving the same alleged conspiracy, this court

[3] Subdivision (c)(1) of Rule 23 provides:

"As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits."

[4] The "Prerequisites to a Class Action" listed in subdivision (a) of Rule 23 are as follows:

"One or more members of a class may sue or be sued as representative parts on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

could not find that number so numerous that joinder of all members was impracticable . . . ." 49 F. R. D., at 21.

On December 12, 1969, eight days after entry of the order denying class action status,[7] the respondents, comprising more than 60 towns, municipalities, and water districts in the State of Utah, all of whom had been claimed as members of the original class, filed motions to intervene as plaintiffs in Utah's action either as of right, under Rule 24 (a)(2)[8] or, in the alternative, by permission under Rule 24 (b)(2),[9] and for other relief not pertinent here. On March 30, 1970, the District Court denied the respondents' motion in all respects, concluding that the limitations period imposed by § 4B of the Clayton Act, as tolled by § 5 (b), had run as to all these

[7] While the memorandum in support of the order denying class action status was dated December 17, 1969, the order itself was filed on December 4, 1969.

[8] "Intervention as of Right. Upon timely application anyone shall be permitted to intervene in an action: (1) when a statute of the United States confers an unconditional right to intervene or (2) when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."

[9] "Permissive Intervention. Upon timely application anyone may be permitted to intervene in an action: (1) when a statute of the United States confers a conditional right to intervene; or (2) when an applicant's claim or defense and the main action have a question of law or fact in common. When a party to an action relies for ground of claim or defense upon any statute or executive order administered by a federal or state governmental officer or agency or upon any regulation, order, requirement or agreement issued or made pursuant to the statute or executive order, the officer or agency upon timely application may be permitted to intervene in the action. In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

respondents and had not been tolled by the institution of the class action in their behalf. 50 F. R. D. 99.

On appeal, the Court of Appeals for the Ninth Circuit affirmed as to the denial of leave to intervene as of right under Rule 24 (a)(2), but, with one judge dissenting, reversed as to denial of permission to intervene under Rule 24 (b)(2).[10] 473 F. 2d 580. Finding that "as to members of the class Utah purported to represent, and whose claims it tendered to the court, suit was actually commenced by Utah's filing," the appellate court concluded that "[i]f the order [denying class action status], through legal fiction, is to project itself backward in time it must fictionally carry backward with it the class members to whom it was directed, and the rights they presently possessed. It cannot leave them temporarily stranded in the present." 473 F. 2d, at 584. We granted certiorari to consider a seemingly important question affecting the administration of justice in the federal courts. 411 U. S. 963.

I

Under Rule 23 as it stood prior to its extensive amendment in 1966, 383 U. S. 1047–1050, a so-called "spurious" class action could be maintained when "the character of

[10] As originally filed, the respondents' motions to intervene included allegations based on events occurring during the four years prior to December 12, 1969, the date of the filing of the motions. The denial of leave to intervene did not apply to these allegations, which were still timely as to the respondents even under the District Court's order, and the order was thus not appealable as a final order under 28 U. S. C. § 1291. Furthermore, in the same order the court declined to certify the question of the tolling effect of the class action as an appealable order under 28 U. S. C. § 1292 (b). 50 F. R. D., at 109–110. The respondents subsequently amended their complaint to confine its allegations to events more than four years prior to the filing of their motions, thereby making the court's order final as to them and permitting immediate appeal under 28 U. S. C. § 1291.

the right sought to be enforced for or against the class is . . . several, and there is a common question of law or fact affecting the several rights and a common relief is sought." [11] The Rule, however, contained no mechanism for determining at any point in advance of final judg-

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[11] Original Rule 23 provided as follows:

"(a) Representation. If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

"(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

"(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

"(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

"(b) Secondary Action by Shareholders. In an action brought to enforce a secondary right on the part of one or more shareholders in an association, incorporated or unincorporated, because the association refuses to enforce rights which may properly be asserted by it, the complaint shall be verified by oath and sh. ver (1) that the plaintiff was a shareholder at the time of the transaction of which he complains or that his share thereafter devolved on him by operation of law and (2) that the action is not a collusive one to confer on a court of the United States jurisdiction of any action of which it would not otherwise have jurisdiction. The complaint shall also set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders such action as he desires, and the reasons for his failure to obtain such action or the reasons for not making such effort.

"(c) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. If the right sought to be enforced is one defined in paragraph (1) of subdivision (a) of this rule notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in paragraphs (2) or (3) of subdivision (a) notice shall be given only if the court requires it."

ment which of those potential members of the class claimed in the complaint were actual members and would be bound by the judgment. Rather, "[w]hen a suit was brought by or against such a class, it was merely an invitation to joinder—an invitation to become a fellow traveler in the litigation, which might or might not be accepted." 3B J. Moore, Federal Practice, ¶ 23.10 [1], at 23–2603. Cf. *Snyder* v. *Harris*, 394 U. S. 332, 335; *Zahn* v. *International Paper Co.*, — U. S. —, —. A recurrent source of abuse under the former Rue lay in the potential that members of the claimed class could in some situations await developments in the trial or even final judgment on the merits in order to determine whether participation would be favorable to their interests. If the evidence at the trial made their prospective position as actual class members appear weak, or if a judgment precluded the possibility of a favorable determination, such putative members of the class who chose not to intervene or join as parties would not be bound by the judgment. This situation—the potential for so-called "one-way intervention"—aroused considerable criticism upon the ground that it was unfair to allow members of a class to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one.[12] The 1966 amendments were designed, in part, specifically to mend this perceived defect in the former Rule and to assure that members of the class would be identified before trial on the merits and would be bound by all subsequent orders and judgments.[13]

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[12] See, *e. g.*, Kalven & Rosenfield, The Contemporary Function of the Class Suit, 8 U. Chi. L. Rev. 684 (1941); Developments in the Law—Multiparty Litigation in the Federal Courts, 71 Harv. L. Rev. 874, 935 (1958); 2 Barron & Holtzoff, Federal Practice & Procedure, § 568 (Wright, ed. 1961).

[13] See Advisory Committee's Note to Proposed Rules of Civil Procedure, 39 F. R. D. 98, 105–106.

Under the present Rule, a determination whether an action shall be maintained as a class action is made by the court "as soon as practicable after the commencement of an action brought as a class action . . . ." Rule 23 (c)(1).[14] Once it is determined that the action may be maintained as a class action under subdivision (b)(3),[15] the court is mandated to direct to members of the class "the best notice practicable under the circumstances" advising them that they may be excluded from the class if they so request, that they will be bound by the judgment, whether favorable or not, and that a member who does not request exclusion may enter an appearance in the case. Rule 23 (c)(2).[16] Finally, the

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[14] See n. 5, *supra*.

[15] Subsection (b)(3) of Rule 23, allowing maintenance of a class action in situations generally analogous to those covered by the "spurious" class suit under former Rule 23, provides that an action may be maintained as a class action "if the prerequisites of subdivision (a) are satisfied," and in addition:

"the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action."

[16] "In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not

present Rule provides that in 23 (b)(3) actions the judgment shall include all those found to be members of the class who have received notice and who have not requested exclusion. Rule 23 (c)(3).[17] Thus, potential class members retain the option to participate in or withdraw from the class action only until a point in the litigation "as soon as practicable after the commencement" of the action when the suit is allowed to continue as a class and they are sent notice of their inclusion within the confines of the class. Thereafter they are either nonparties to the suit and ineligible to participate in a recovery or be bound by a judgment, or else they are full members who must abide by the final judgment, whether favorable or adverse.

Under former Rule 23, there existed some difference of opinion among the federal courts of appeals and district courts as to whether parties should be allowed to join or intervene as members of a "spurious" class after the termination of a limitation period, when the initial class action complaint had been filed before the applicable statute of limitations period had run. A majority of the courts ruling on the question, emphasising the representative nature of a class suit, concluded that such intervention was proper.[18] Other courts concluded that

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request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel."

[17] "The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion and whom the court finds to be members of the class."

[18] *York* v. *Guaranty Trust Co.*, 143 F. 2d 503 (CA2 1944), rev'd on other grounds 326 U. S. 99; *Escott* v. *Barchris Construction Corp.*,

since a "spurious" class action was essentially a device to permit individual joinder or intervention, each individual so participating would have to satisfy the timeliness requirement.[19] This conflict in the implementation of the former Rule was never resolved by this Court.

Under present Rule 23, however, the difficulties and potential for unfairness which, in part, convinced some courts to require individualized satisfaction of the statute of limitations by each member of the class, have been eliminated, and there remain no conceptual or practical obstacles in the path of holding that the filing of a timely class action complaint commences the action for all members of the class as subsequently determined.[20] Whatever the merit in the conclusion that one seeking to join a class after the running of the statutory period asserts a "separate cause of action" which must individually meet the timeliness requirements, *Athas* v. *Day*, 161 F. Supp. 916, 919 (Colo. 1958), such a concept is simply inconsistent with Rule 23 as presently drafted. A federal class action is no longer "an invitation to joinder" but a truly representative suit designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions. Under the circumstances of this case, where

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340 F. 2d 731 (CA2 1965); *DePinto* v. *Provident Security Life Insurance Co.*, 323 F. 2d 826 (CA9 1963); *Union Carbide Corp.* v. *Nisley*, 300 F. 2d 561 (CA10 1961).

[19] *Pennsylvania Co. for Insurances* v. *Deckert*, 123 F. 2d 979 (CA3 1941); *Athas* v. *Day*, 161 F. Supp. 916 (Colo. 1958). The cases arising under former Rule 23 are discussed and analyzed in Simeone, Procedural Problems of Class Suits, 60 Mich. L. Rev. 905 (1962); Note, Class Actions Under New Rule 23 and Federal Statutes of Limitations: A Study of Conflicting Rationale, 13 Vill. L. Rev. 370 (1968).

[20] The courts that have dealt with this problem under present Rule 23 have reached this conclusion. *Esplin* v. *Hirschi*, 402 F. 2d 94 (CA10 1968); *Philadelphia Elec. Co.* v. *Anaconda Am. Brass Co.*, 43 F. R. D. 452 (ED Pa. 1968).

the District Court found that the named plaintiffs asserted claims that were "typical of the claims or defenses of the class" and would "fairly and adequately protect the interests of the class," Rule 23 (a)(3), (4), the claimed members of the class stood as parties to the suit until and unless they received notice thereof and chose not to continue. Thus, the commencement of the action satisfied the purpose of the limitation provision as to all those who might subsequently participate in the suit as well as for the named plaintiffs. To hold to the contrary would frustrate the principal function of a class suit, because then the sole means by which members of the class could assure their participation in the judgment if notice of the class suit did not reach them until after the running of the limitation period would be to file earlier individual motions to join or intervene as parties—precisely the multiplicity of activity which Rule 23 was designed to avoid in those cases where a class action is found "superior to other available methods for the fair and efficient adjudication of the controversy." Rule 23 (b)(3).

We think no different a standard should apply to those members of the class who did not rely upon the commencement of the class action (or who were even unaware that such a suit existed) and thus cannot claim that they refrained from bringing timely motions for individual intervention or joinder because of a belief that their interests would be represented in the class suit.[21] Rule

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[21] In *York* v. *Guaranty Trust Co.*, *supra*, the Court of Appeals for the Second Circuit permitted joinder into a "spurious" class suit on the reasoning that to rule otherwise would create a "trap for the unwary" who might refrain from instituting suit on the supposition that their interests were represented in the class suit. 143 F. 2d, at 529. As a member of that court subsequently observed, the contrary rule could be a "trap" only for those who were aware of and relied upon the commencement of the class suit. *Escott* v. *Barchris*

23 is not designed to afford class action representation only to those who are active participants in or even aware of the proceedings in the suit prior to the order that the suit shall or shall not proceed as a class action. During the pendency of the District Court's determination in this regard, which is to be made "as soon as practicable after the commencement of an action," potential class members are mere passive beneficiaries of the action brought in their behalf. Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case. It follows that even as to asserted class members who were unaware of the proceedings brought in their interest or who demonstrably did not rely on the institution of those proceedings, the later running of the applicable statute of limitations does not bar participation in the class action and in its ultimate judgment.

II

In the present case the District Court ordered that the suit could *not* continue as a class action, and the participation denied to the respondents because of the running of the limitation period was not membership in the class, but rather the privilege of intervening in an individual suit pursuant to Rule 24 (b)(2).[22] We hold that in this

Const. Co., supra., 340 F. 2d, at 735 (Friendly, J., concurring). See also Comment, Spurious Class Actions Based upon Securities Frauds under the Revised Federal Rules of Civil Procedure, 35 Ford. L. Rev. 295, 308–309 (1966). In the present litigation, the District Court found that only seven of the more than 60 intervenors were aware of and relied on the attempted class suit. 50 F. R. D., at 101 and n. 1.

[22] The petition for certiorari did not, of course, present the question of whether intervention as of right under Rule 24 (a)(2) was properly denied by the District Court, and we do not reach that

posture, at least where class action status has been denied solely because of failure to demonstrate that "the class is so numerous that joinder of all members is impracticable," the commencement of the original class suit tolls the running of the statute for all purported members of the class who make timely motions to intervene after the court has found the suit inappropriate for class action status. As the Court of Appeals was careful to note in the present case, "Maintenance of the class action was denied not for failure of the complaint to state a claim on behalf of the members of the class (the court recognized the probability of common issues of law and fact respecting the underlying conspiracy), not for lack of standing of the representative, or for reasons of bad faith or frivolity." 473 F. 2d, at 584. (Footnote omitted.)

A contrary rule allowing participation only by those potential members of the class who had earlier filed motions to intervene in the suit would deprive Rule 23 class actions of the efficiency and economy of litigation which is a principal purpose of the procedure. Potential class members would be induced to file protective motions to intervene or to join in the event that a class was later found unsuitable. In cases such as this one, where the determination to disallow the class action was made upon considerations that may vary with such subtle factors as experience with prior similar litigation or the current status of a court's docket,[23] a rule requiring successful

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question. Our conclusion as to the effect of the commencement of a class suit on tolling the statute of limitations as to those who subsequently move to intervene by permission under Rule 24 (b)(2) would apply *a fortiori* to intervenors as of right under 24 (a).

[23] As indicated, *supra*, pp. 4–5, Judge Pence based his conclusion that the number of potential members was not so large as to make joinder impracticable on inferences from his prior experience with similar antitrust litigation against the same defendants. Not only

anticipation of the determination of the viability of the class would breed needless duplication of motions. We are convinced that the rule most consistent with federal class action procedure must be that the commencement of a class action suspends the applicable statute of limitations as to all asserted members of the class who would have been parties had the action been permitted to continue as a class.[24]

This rule is in no way inconsistent with the functional operation of a statute of limitations. As the Court stated in *Order of Railroad Telegraphers* v. *Railway Express Agency*, 321 U. S. 342, statutory limitation periods are "designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has faded, and witnesses have disappeared. The theory is that even if one has a just claim it is unjust not to put the adversary on notice to defend within the period of limitation and that the right to be free of stale claims in time comes to prevail over the right to prosecute them." *Id.*, at 348–349. The policies of ensuring essential fairness to defendants and of

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would a district court's estimate of the expected attrition among the class of plaintiffs be difficult for any individual plaintiff to predict, but other federal courts have indicated that subsequent attrition will not be considered as a factor affecting numerosity under Rule 23 (a)(1) when considered at the outset of the case. See, *e. g.*, *Iowa* v. *Union Asphalt & Roadoils, Inc.*, 281 F. Supp. 391, 401 (SD Iowa 1968); 3B J. Moore, Federal Practice ¶ 23.05, at 23–279. Indeed, one commentator has observed that "[t]he federal decisions under original Rule 23 (a) reflect . . . contrariety of opinion as to the meaning of 'numerous.'" *Id.*, at 23–272.

[24] The Advisory Committee's Note on Proposed Rule 23 observes on the issue resolved here only that the question "whether the intervenors in the nonclass action shall be permitted to claim . . . the benefit of the date of the commencement of the action for purposes of the statute of limitations [is] to be decided by reference to the laws governing . . . limitations as they apply in particular contexts." 39 F. R. D., at 104.

barring a plaintiff who "has slept on his rights," *Burnett v. New York Central Railway*, 380 U. S. 424, 428, are satisfied when, as here, a named plaintiff who is found to be representative of a class commences a suit and thereby notifies the defendants not only of the substantive claims being brought against them, but also of the number and generic identities of the potential plaintiffs who may participate in the judgment. Within the period set by the statute of limitations, the defendants have the essential information necessary to determine both the subject matter and size of the prospective litigation, whether the actual trial is conducted in the form of a class action, as a joint suit, or as a principal suit with additional intervenors.[25]

Since the imposition of a time bar would not in this circumstance promote the purposes of the statute of limitations, the tolling rule we establish here is consistent both with the procedures of Rule 23 and with the proper function of the limitations statute. While criticisms of Rule 23 and its impact on the federal courts have been both numerous and trenchent, see, *e. g.*, American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure (1972); H. Friendly, Federal Jurisdiction: A General View 118–120 (1973); Handler, The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual

[25] As Judge Friendly has noted, in certain situations the intervenors may raise issues not presented in the class action complaint and to that extent the defendants will not have received notice of the nature of the claims against them. *Escott v. Barchris Construction Corp.*, *supra*, 340 F. 2d, at 735 (concurring opinion). This problem, however, will be minimized when, as here, the District Court has already found that the named plaintiffs' claims typify those of the class. Furthermore, under Rule 23 (d)(3) "the court may make appropriate orders . . . imposing conditions on . . . intervenors."

Antitrust Review, 71 Col. L. Rev. 1, 5–12 (1971); Handler, Twenty-Fourth Annual Antitrust Review, 72 Col. L. Rev. 1, 34–42 (1972), this interpretation of the Rule is nontheless necessary to insure effectuation of the purposes of litigative efficiency and economy that the Rule in its present form was designed to serve.

III

The petitioners contend, however, that irrespective of the policies inherent in Rule 23 and in statutes of limitations, the federal courts are powerless to extend the limitation period beyond the period set by Congress because that period is a "substantive" element of the right conferred on antitrust plaintiffs and cannot be extended or restricted by judicial decision or by court rule.[26] Unlike the situation where Congress has been silent as to the period within which federal rights must be asserted,[27] in the antitrust field Congress has specified a precise limitation period, and further has provided for a tolling period in the event that government litigation is instituted. The inclusion of the limit and the tolling period,

[26] The Enabling Act empowering the Supreme Court to promulgate rules of procedure commands that "[s]uch rules shall not abridge, enlarge or modify any substantive right . . ." 28 U. S. C. § 2072.

[27] In such situations the federal courts have generally looked to local law as the source of a federal limitation peroid. "Apart from penal enactments, Congress has usually left the limitation of time for commencing actions under national legislation to judicial implications. As to actions at law, the silence of Congress has been interpreted to mean that it is federal policy to adopt the local law of limitation. [Citations omitted.] The implied absorption of state statutes of limitation within the interstices of the federal enactments is a phase of fashioning remedial details where Congress has not spoken but left matters for judicial determination within the general framework of familiar legal principles." *Holmberg* v. *Armbrecht*, 327 U. S. 392, 395. See *Auto Workers* v. *Hoosier Corp.*, 383 U. S. 696. But see *McAllister* v. *Magnolia Petroleum Co.*, 357 U. S. 221.

the petitioners assert, makes the "substantive" statute immune from extension by "procedural" rules. They rely in large part on the Court's decision in *The Harrisburg* v. *Rickards*, 119 U. S. 199, in which it was stated, with respect to state wrongful death statutes,

> "The statutes create a new legal liability, with the right to a suit for its enforcement, provided the suit is brought within 12 months, and not otherwise. The time within which the suit must be brought operates as a limitation of the liability itself as created, and not of the remedy alone. It is a condition attached to the right to sue at all." *Id.*, at 214.

In *The Harrisburg*, however, the Court dealt with a situation where a plaintiff who was invoking the maritime jurisdiction of a federal court sought relief under a state statute providing for substantive liability.[18] The Court held that when a litigant in a federal court asserted a cause of action based upon a state statute he was bound by the limitation period contained within that statute rather than by a federal time limit. Cf. *Guaranty Trust Co.* v. *York*, 326 U. S. 99. But the Court in *The Harrisburg* did not purport to define or restrict federal judicial power to delineate circumstances where the applicable statute of limitations would be tolled. As we said in *Burnett*, *supra*, "While the embodiment of a limitation provision in the statute creating the right which it modifies might conceivably indicate a legislative intent that the right and limitation be applied together when the right is sued upon in a foreign forum, the fact that the right and limitation are written into the same statute

[18] The plaintiff in *The Harrisburg* initially claimed that federal maritime law afforded him a substantive cause of action for wrongful death. The Court held in that case that the federal maritime law did not extend to such suits. This holding was overruled in *Moragne* v. *States Marine Lines, Inc.*, 398 U. S. 375

does not indicate a legislative intent as to whether or when the statute of limitations should be tolled." 380 U. S. at 427 n. 2. The proper test is not whether a time limitation is "substantive" or "procedural," but whether tolling the limitation in a given context is consonant with the legislative scheme."[29]

In recognizing judicial power to toll statutes of limitation in federal courts we are not breaking new ground. In *Burnett v. New York Central R. Co., supra*, a railroad employee claiming rights under the Federal Employers' Liability Act, 45 U. S. C. § 51 *et seq.*, initially brought suit in a state court within the three-year time limitation specifically imposed by § 56 of the Act. The state proceeding was subsequently dismissed because of improper venue. Immediately after the dismissal, but also after the running of the limitation period, the employee attempted to bring suit in federal court. Reversing determinations of the District Court and the Court of Appeals that the federal suit was time barred, the Court held that the commencement of the state suit fulfilled the policies of repose and certainty inherent in the limi-

[29] Our conclusion that a judicial tolling of the statute of limitations does not abridge or modify a substantive right afforded by the antitrust acts is consistent with what scant legislative history there is on the limitation and tolling provisions. Sections 4B and 5 (b) of the Clayton Act were added to the antitrust laws in 1955, long after the original substantive liabilities were established. During debate a member of the House Judiciary Committee reporting the bill was asked, "Am I correct in assuming that this limitation provided by this amendment is strictly a procedural limitation and has nothing to do with substances?", to which he replied: "It was the specific purpose of the committee in reporting this bill to in no way affect the substantive rights of individual litigants. It is simply a procedural change and suggested with the thought of setting up a uniform statute of limitations. That is the sole purpose." 101 Cong. Rec. 5131, 84th Cong., 1st Sess. (1955) (remarks of Mr. Murray and Mr. Quigley).

[redacted]

[redacted] *Eastern Terminal*, 359 U. S. 281, or because of fraudulent concealment, *Holmberg* v. *Armbrecht*, 327 U. S. 392, this Court has not hesitated to find the statutory period tolled or suspended by the conduct of the defendant. In *Glus*, *supra*, the Court specifically rejected a contention by the defendant that when "the time limitation is an integral part of a new cause of action . . . that cause is irretrievably lost at the end of the statutory period." 359 U. S., at 232. To the contrary, the Court found that the strict command of the limitation period provided in the federal statute was to be suspended by considerations "[d]eeply rooted in our jurisprudence." *Ibid.*

These cases fully support the conclusion that the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose.

IV

Finally, the petitioners urge that the Court of Appeals' reversal of the District Court for failure to permit intervention under Rule 24 (b)(2) was nonetheless improper because the District Court in denying such permission was doing no more than exercising a legal discretion which the Court of Appeals did not find to be abused.[20] They point out that Rule 24 (b) explicitly refers to a district judge's permission to intervene as an exercise of

[20] The dissenting judge in the Court of Appeals based his conclusion on this ground. 473 F. 2d, at 584.

discretion," and that this Court has held that "the exercise of discretion in a matter of this sort is not reviewable by an appellate court unless clear abuse is shown." [illegible] v. National Cash Register Co., 332 U. S. 218; see also Smith Board of School Trustees, [illegible] 332 U. S. 232, 234.

[illegible] comment in response to this case, however, [illegible] the conflicting affidavits in favor of either [illegible], but only found that the respondents were [illegible] by the statute of limitations. This determination was not an exercise of discretion, but rather a conclusion of law which the Court of Appeals correctly found to be erroneous. The judgment of the Court of Appeals reversing the District Court's order directed that the case be remanded "for further proceedings upon the motions [to intervene]." 473 F. 2d, at 584. Rather than reviewing an exercise of discretion, the Court of Appeals merely directed that discretion be exercised.[22]

V

It remains to determine the precise effect the commencement of the class action had on the relevant

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[21] Rule 24 concludes, "*In exercising its discretion* [as to whether to permit intervention] the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties." (Emphasis added.)

[22] Furthermore, there is persuasive intrinsic evidence that Judge Pence ruled against the respondents only on the issue of the applicability of the statute of limitations. First, his original conclusion that joinder was a more practicable remedy, 49 F. R. D., at 20, would be incongruous if immediately thereafter he asserted that intervention was, in fact, impracticable. Second, as noted previously, n. 10, *supra*, the District Court did not deny leave to intervene as to those who confined the allegations of their complaints to events occurring less than four years prior to the motions to intervene.

limitation period. Section 5 (b) of the Clayton Act provides that the running of the statutes of limitations be "suspended" by the institution of a government antitrust suit based on the same subject matter. The same concept leads to the conclusion that the commencement of the class action in this case suspended the running of the limitations period only during the pendency of the motion to strip the suit of its class action character. The class suit brought by Utah was filed with 11 days yet to run in the period as tolled by § 5 (b), and the intervenors thus had 11 days after the entry of the order denying them participation in the suit as class members in which to move for permission to intervene. Since their motions were filed only eight days after the entry of Judge Pence's order, it follows that the motions were timely.

The judgment of the Court of Appeals for the Ninth Circuit is therefore

Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 72–1195

American Pipe and Construction Co. et al., Petitioners, v. State of Utah et al. | On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

[January 16, 1974]

MR. JUSTICE BLACKMUN, concurring.

I join the Court's opinion and concur in its judgment. Our decision, however, must not be regarded as encouragement to lawyers in a case of this kind to frame their pleadings as a class action, intentionally, to attract and save members of the purported class who have slept on their rights. Nor does it necessarily guarantee intervention for all members of the purported class.

As the Court has indicated, the purpose of statutes of limitations is to prevent surprises "through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared." *Order of Railroad Telegraphers* v. *Railway Express Agency, Inc.*, 321 U. S. 342, 348–349 (1944). Under our decision today, intervenors as of right will be permitted to press their claims subject only to the requirement that they have an interest relating to the property or transaction and be impaired or impeded in their ability to protect that interest. Fed. Rule Civ. Proc. 24 (a). Such claims, therefore, invariably will concern the same evidence, memories, and witnesses as the subject matter of the original class suit, and the defendant will not be prejudiced by later intervention, should class relief be denied. Permissive intervenors may be barred, however, if the District Judge, in his

discretion, concludes that the intervention will "unduly delay or prejudice the adjudication of the rights of the original parties." Fed. Rule Civ. Proc. 24 (b). The proper exercise of this discretion will prevent the type of abuse mentioned above and might preserve a defendant whole against prejudice arising from claims for which he has received no prior notice.

The provision in Fed. Rule Civ. Proc. 23 (c)(1), that an order allowing the maintenance of a suit as a class action "may be conditional, and may be altered or amended before the decision on the merits," could be viewed to generate uncertainty under the Court's decision, for the class aspect might be disbanded after the litigation has long been underway. Rule 23, of course, provides that the court shall decide whether a class action may be maintained "[a]s soon as practicable after the commencement of an action." This decision, therefore, will normally be made expeditiously. And any later alteration with respect to intervention is subject to the discretionary elements of Rule 24 (b), mentioned above, and to Rule 23 (d)(3)'s provision that "the court may make appropriate orders . . . imposing conditions . . . on intervenors."

FILED

FEB 7 1974

IN THE

Supreme Court of the United States

October Term, 1972
No. 72-1195

AMERICAN PIPE AND CONSTRUCTION CO., SMITH-SCOTT CO., INC., UNITED CONCRETE PIPE COMPANY, KAISER STEEL CORPORATION, UNITED STATES STEEL CORPORATION, U.S. INDUSTRIES, INC., UTAH CONCRETE PIPE COMPANY, W. R. WHITE COMPANY, all corporations,

Petitioners,

vs.

STATE OF UTAH, a body politic, *et al.*,

Respondents.

PETITION FOR REHEARING.

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Petitioners,

vs.

STATE OF UTAH, a body politic, *et al.*,

Respondents.

PETITION FOR REHEARING.

Petitioners respectfully petition this Court for a rehearing of the above-entitled cause as to certain respondents[1] who filed motions for intervention in the District Court on December 29, 1969 [A. 4, 386-87; R. 364-66].

This Petition for Rehearing is based upon the fact that certain of the respondents did not move to intervene before the District Court until *after* the eleven-day period for intervention stated in this Court's Opinion (United States Supreme Court Slip Opinion, dated

[1]City of Grantsville, City of Riverton, Town of Perry, Town of Annabella, Salt Lake County Cottonwood Sanitary District and Sandy City (A. 386-87).

January 16, 1974, p. 22). This Petition for Rehearing is also based upon the printed record herein (Appendix, Volumes I and II).

I.

Statement of the Case.

The Court's Opinion of January 16, 1974, affirms the judgment of the Court of Appeals for the Ninth Circuit. It is respectfully submitted that as to certain respondents[2] the judgment of the Court of Appeals and the Opinion of this Court is unsupported by the record herein. Such respondents did not move to intervene until December 29, 1969 (which was twenty-five (25) days after the Court's order of December 4, 1969) [A. 4, 386-87; R. 364-66].

II.

The Opinion of This Court May Be Construed as Permitting Intervention by Each of the Respondents Who Did Not Move to Intervene Until After the Period of Time Designated Therein.

This Court's Opinion, dated January 16, 1974, reads in part as follows:

> "The class suit brought by Utah was filed with 11 days yet to run in the period as tolled by § 5(b), and the intervenors thus had 11 days after the entry of the order denying them participation in the suit as class members in which to move for permission to intervene. Since their motions were filed only eight days after the entry of Judge Pence's order, it follows that the motions were timely." (United States Supreme Court Slip Opinion, dated January 16, 1974, p. 22).

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[2]A. 4, 386-87; R. 364-66; See, Footnote 1, *supra.*

It is true that a majority of respondents filed motions to intervene on December 12, 1969, which was eight days after the Court's order of December 4, 1969 [A. 3, 355-59; R. 359-63]. However, certain of the respondents[3] did not file motions to intervene until December 29, 1969 [A. 4, 386-87; R. 364-66]. The latter date was two weeks after the period of intervention designated by this Court's Opinion. It follows that as to the respondents who filed their motions to intervene on December 29, 1969, the order of the trial court denying leave to intervene must be affirmed.

III.
Conclusion.

It is respectfully submitted that this Court should issue its mandate directing reinstatement of the Order of the District Court as to respondents who filed motions for intervention on December 29, 1969.

Dated: February 7, 1974.

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(Continued on next page)

[3]City of Grantsville, City of Riverton, Town of Perry, Town of Annabella, Salt Lake County Cottonwood Sanitary District and Sandy City (A. 486-87).

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Certificate of Counsel.

Counsel for petitioners hereby certifies that the Petition for Rehearing herein is presented in good faith and is not for delay. Counsel also certifies that the Petition for Rehearing is restricted to the grounds stated therein, namely, that certain of the respondents did not file motions to intervene until December 29, 1969, which is after the eleven-day period for intervention as determined by this Court.

Dated: February 7, 1974.

JESSE R. O'MALLEY,

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